85-1682

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Supreme Court, U.S.
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No.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LACY B. WARD
Petitioner

v.

U. S. CONSUMER PRODUCT SAFETY COMMISSION
Respondent

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Federal Circuit

Lacy B. Ward
124 So. 50th Street
Philadelphia, PA 19139
(215) 747-2440
Appearing pro se

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I

QUESTIONS PRESENTED

I. Whether agency's failure to notify petitioner of the August 8, 1980 Lowell Dodge removal recommendation, with supporting evidence, and failure to provide him an opportunity to respond to the material prior to his termination denied petitioner of his Fifth Amendment right to due process.

II. Whether deciding official's solicitation and consideration of Lowell Dodge's August 8, 1980 recommendation constituted a prohibited personnel practice as defined in 5 USC 2302 (b) (2), thereby denying petitioner of his Fifth Amendment right to due process.

III. Whether the private communication of adversaries with the decision maker in this removal action on the merits of the case constituted illegal ex parte communication, thereby

violating petitioner's Fifth Amendment right to due process.

IV. Whether petitioner was reassigned .

III

PARTIES

The petitioners in the proceeding in the United States Court of Appeals for the Federal Circuit were Lacy B. Ward and Renea A. Webb. The Ward and Webb cases were joined on motion to the Merit Systems Protection Board (MSPB). The Respondent was the U. S. Consumer Product Safety Commission (CPSC).

Petitioner believes that Renea A. Webb has no interest in the outcome of the appeal.

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VII

CONSTITUTIONAL PROVISIONS

U. S. Constitution, Amendment V 3

"No person shall....be deprived of life, liberty, or property, without due process of law..."

STATUTES

28 U.S.C. Sect 1295 (a) (9) 3

"The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction.... of an appeal from a final order or final decision of the Merit System Protection Board, Pursuant to Sections 7703 (b) (1) and 7703 (d) of Title 5..."

5 U.S.C. Sect. 7703 (a) (1) (2) (b) (1) (c) (1) (2) (3) 4

"(a) (1) Any employee or applicant for employment adversely affected or aggrieved by a final order or decision of the Merit Systems Protection Board may obtain judicial review of the order or decision."

"(2)...

"(b) (1) Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed

within 30 days after the date the petitioner received notice of the final order or decision of the board.

"(C) In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency action, findings, or conslusions found to be--

"(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) obtained without procedures required by law, rule, or regulation having been followed; or
(3) unsupported by substantial evidence;..."

5 U.S.C. Sect. 7701 (c) (2) (B) (C) 21,22

"(C)..(2) Notwithstanding paragraph (1), the agency's decision may not be sustained under subsection (b) of this section if the employee or applicant for employment...

(B) shows that the decision was based on any prohibited personnel practice described in Section 2302 (b) of this title; or
(C) shows that the decision was not in accordance with law."

5 U.S.C. 7513 (b) (1) (2) (3) 13

"(b) An employee against whom an action is proposed is entitled to--

(1) at least 30 days advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment

may be imposed, stating the specific reasons for the proposed action;

(2) a reasonable time, but not less than 7 days, to answer orally and in writing and to furnish affidavits and other documentary evidence in support of the answer;

(3) be represented by an attorney or other representative:"

5 U.S.C. Sect. 2302 (b) (2) 21,22

"Any employee who has authority to take, direct others to take, recommend or approve any personnel action, shall not, with respect to such authority--...solicit or consider any recommendation or statement, oral or written, with respect to any individual who request or is under consideration for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consist of (A) an evaluation of the work performance, ability, aptitute, or general qualification of such individual; or (B) an evaluation of the character, loyalty, or suitability of such individual;"

28 U.S.C. Sect. 1254 (1) 3

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petitioner or any party to any civil or criminal case, before or after rendition of judgment or decree;"

X

REGULATIONS

5 C.F.R. Sect. 752 404 (b) (1) (c) (1) (2) (f) 13

(b) Notice of proposed action. (1) The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice. The agency may not use material which cannot be disclosed to the employee or his or her representative or designated physician under Sec. 297.108 (c) (1) of Part 297 of this title to support the reasons in the notice.

(c) Employee's answer. (1) The agency shall give the employee a reasonable amount of official time to review the material relied on to support its proposal and to prepare an answer and to secure affidavits, if he or she is otherwise in an active duty status.

(2) The agency shall designate an official to hear the employee's oral answer who has authority either to make or recommend a final decision on the proposed adverse action. The right to answer orally in person does not include the right to a formal hearing with examination of witnesses unless the agency provides one in its regulations in accordance with paragraph (g) of this section.

(f) Agency decision. In arriving at its written decision, the agency shall consider only the reasons specified in the notice of proposed action and shall

consider any answer of the employee and/or his or her representative made to a designated official. The agency shall deliver the notice of decision to the employee at or before the time the action will be effective. The notice shall tell the employee of his or her appeal rights.

5 C.F.R. Sect. 210.102 (b) (12) 17

(12) "Reassignment" means a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion.

OTHER AUTHORITIES

Federal Personnel Manual (FPM) 4-2a, of Chapter 295 18

"Standard Form 50. The current edition of SF 50, Notification of Personnel Action is used to record personnel actions (as required by the instructions in FPM Supplement 296-32)..."

FPM Supplement 296-31, pg 1 18

"a. This supplement provides guidance for personnel offices in processing personnel actions. It brings together the procedural instructions established by the Office of Personnal Management (OPM) under subchapter II of chapter 29 of title 5, United States Code, and the civil service rules and regulations covering operations and details involved in effecting and documenting personnel actions."

FPM Supplement 296-31, pg. V-27 18

"(d) Reporting Requirements. All personnel actions covered by this table must be reported on Standard Form 50 (or its equivalent) unless the agency has been specifically authorized by the OPM to use some other method of recording the personel action."

No. 1

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

LACY B. WARD
Petitioner

vs.

U. S. CONSUMER PRODUCT SAFETY COMMISSION
Respondent

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Federal Curcuit

OPINIONS BELOW

On April 13, 1982, the MSPB presiding official issued his initial decision affirming the agency's (CPSC) removal action. (A-8)

On June 26, 1984, MSPB issued its final

Order, denying the petition for review by the initial decision. (A-4)

On August 6, 1985, the United States Court of Appeals for the Federal Circuit issued and filed, its decision, affirming the decision of the MSPB on the basis of the opinion of the MSPB presiding official. (A-2)

On January 15, 1986, the United States Court of Appeals for the Federal Circuit issued its order, denying the petition for rehearing and declining the suggestion for rehearing en banc. (A-1)

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the United States Court of Appeals for the Federal Circuit entered on August 6, 1985. Petitioner filed a petition for rehearing and suggestion for rehearing en banc on August 17, 1985, which petition was denied on order entered January 15, 1986. Therefore, this

petition was filed within ninety days of the date of the decision on the petition for rehearing and a suggestion for rehearing en banc.

The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. 1254 (1).

STATEMENT OF THE CASE

Petitioner filed a petition for review in the United States Court of Appeals for the Federal Circuit on July 30, 1984 (Case No. 84-1776), seeking review of a final order of the Merit Systems Protection Board (MSPB), dated June 26, 1984 (Docket No. PH07528010437 and PH07528010307). Petition to the Court of Appeals for the Federal Circuit was filed pursuant to 28 U.S.C. Sect. 1295 (a) (9). MSPB affirmed the Agency's decision to remove petitioner from his position of Director of its Philadelphia Regional office. The effective date of removal was September 5, 1980.

MSPB's decision was issued in two parts, an initial decision by the presiding official dated April 13, 1982 and a final order by MSPB dated June 26, 1984 denying appellant's petition for review of the initial decision.

The petition for review of the final MSPB decision was filed in the United States Court of Appeals for the Federal Circuit July 30, 1984, pursuant to 5 USC 7703. The appellant court affirmed the MSPB decision on August 6, 1985.

A petition for rehearing by the panel and suggestion for rehearing en banc was timely filed with the United States Court of Appeals for the Federal Circuit on August 17, 1985. The appeals court denied petition for rehearing and suggestion for rehearing en banc, January 15, 1986.

This petition ask this court to review the Court of Appeals for the Federal Circuit's judgment, affirming the MSPB decision in

petitioner's removal from federal government service as it pertains to issues contained herein.

Issues before this court were raised at the administrative level (MSPB) and before the appellate judicial level.

The issues were presented to the MSPB Presiding Official prior to the hearing in a written list of affirmative defenses. The issues were raised before the Appeals Court in the petition for review and in the brief.

FACTS

There is no controversy over the facts in this case. Appellant was employed by CPSC as Director of its Philadelphia Regional Office between May, 1973 and September 5, 1980, the date of his termination. He was a career civil service employee with 24 years continuous service. He served a tour of active duty

as a commissioned officer in the U. S. Army 1953 to 1955, and was honorably discharged at the rank of First Lieutenant. In additional to CPSC Regional Director's position, Ward held positions of Food and Drug Inspector, Compliance Officer, and Public Health Analyst (Product Safety Consultant) with the U. S. Food and Drug Administration, July 1956 to May 1973.

Ward received a letter dated May 23, 1980, signed by Richard A. Gross, Executive Director, CPSC informing him that he would be reassigned to CPSC headquarters in Bethesda, Maryland, effective July 7, 1980. A certificate was attached to the May 23, 1980 letter from Gross with instructions to complete the certificate and return it to Gross no later than 15 calendar days after its receipt. Instructions with the certificate stated in pertinent part, "Failure to deliver the certificate containing your decision will be considered as a declination of

the directed reassignment. Failure to deliver a written resignation before the reassignment effective date, July 7, 1980, will also be considered as a declination of the directed reassignment." Ward did not return the certificate nor did he tender his resignation.

A letter to Ward dated June 17, 1980, signed by Richard A. Gross, was telecopied and received by Ward on June 17, 1980. This letter directed Ward to respond to Gross by close of business day June 18, 1980, as to whether Ward accepted or declined the reassignment. Ward responded by letter dated June 18, 1980, stating "I decline to accept my directed reassignment."

Ward received a letter of proposed termination from Gross dated June 24, 1980 on or about June 25, 1980.

Richard Gross, as Executive Director, was Ward's second line supervisor. At no time prior to , nor following issuance of the June 24, 1980 letter of proposed removal did the

agency complete a Standard Form-50 (SF-SO), Notification of Personnel Action, effecting Ward's reassignment. Ward responded to Gross's letter of proposed removal by letter dated July 2, 1980, to Susan King, Chairman, CPSC.

By memorandum dated August 8, 1980, Lowell Dodge, Executive Assistant to Susan King, provided King (deciding official) his recommendation for removal of Ward, accompanied by documentation he compiled during his several weeks of fact finding as requested by Susan King.

The letter containing the CSPC's final decision to remove Ward from the federal service was dated September 2, 1980, effective September 5, 1980.

Ward was not aware of the Dodge memorandum dated August 8, 1980 until January 16, 1981, more than four months

following his termination from employment with CPSC. Dodge's memoranda and supporting documentation, described as "Adverse Action File" was presented to Ward during a pre-hearing conference on January 16, 1981 by Counsel for CPSC, Ronald Deutsch.

The August 8, 1982 memorandum from Dodge to King contained statements indicating his contacts with adversarial officials in CPSC and memoranda of his telephone conversations with those officials. The Dodge recommendation and supporting material was relied on by King in reaching her final decision to remove petitioner from his federal employment.

REASONS FOR GRANTING REVIEW

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL

CIRCUIT IS CONTRARY TO UNITED STATES SUPREME COURT PRECEDENT.

In order to correct, the afore-stated contradictions with Supreme Court precedent, Petitioner urges the grant of certiorari.

It is long standing that this court has insisted that, at a minimum, due process demands notice and an opportunity to respond before an individual is deprived of a property interest, absent extraordinary circumstances. No exigency is claimed in this case.

Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1952)

Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306 (1950)

Goss, v. Lopez, 419 U.S. 565 (1975)

Fuentes v. Shevin, 407 U.S. 67 (1972)

Bishop v. Wood, 426 U.S. 341 (1976)

Vitek v. Jones, 445 U.S. 480 (1980)

Logan v. Zimmerman Brush Co., 445 U. S. 422 (1982)

Boddie v. Connecticut, 401 U.S. 371 (1971)

Board of Regents v. Roth, 408 U.S. 564 (1972)

Mathews v. Edlridge, 424 U.S. 319 (1976)

Goldberg v. Kelly, 397 U.S. 254 (1970)

Arnett v. Kennedy, 416 U.S. 134 (1974)

This court ruled in its decision of Cleveland Board of Education v. James Loudermill et al. 105 S. Ct. 1487-1488., (1985);

> "Public employees having property right in continued employment cannot be deprived of that property right...without due process..."
>
> "An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and opportunity for hearing appropriate to the nature of the case..."

> "Due process clause requires some kind of a hearing prior to discharge of employee who has a constitutionally protected property interest in continued employment...."

There is no dispute over petitioner's status as a career civil service employee with property interest in his continued employment.

By letter dated June 24, 1980, signed by Richard A. Gross, Executive Director, petitioner was notified that his removal was proposed. The reason given for the proposed removal was "Therefore, since you have declined to accept the reassignment, in order to promote efficiency of government service, I am proposing to separate you from your employment with the commission."

Susan B. King, deciding official without petitioner's knowledge, solicited and received from her Executive Assistant,

Lowell Dodge, a second recommendation for removal of petitioner dated August 8, 1980. It is this Dodge recommendation, with expanded charges, conclusions reached from one-sided fact finding and supporting documentation not revealed to petitioner prior to termination, which forms the basis for questions #I, II and III in this petition.

Petitioner herein contends that consideration of the Dodge removal recmmendation without notifying petitioner and affording him an opportunity to respond violated 5 U.S.C. Sect. 7513 (b) (1) (2) (3), and 5 CFR Sect. 752.404 (b) (1) (c) (1) (2) and (f).

The file compiled by Dodge for King's consideration in Ward's removal reveals contacts with parties with interest in the outcome of the case, because of their past involvement, this

demonstrates illegal ex parte contacts and a denial of 5th Amendment rights to due process.

The affirmation of the MSPB decision by the Court of Appeals for the Federal Circuit, in view of the evidence of illegal ex parte communication. See Sangamon Valley Television Corporation v. United States of America and F.C.C., 79 S. Ct. 94. Certiorari granted and on remand the U.S. Court of Appeals for District of Columbia Circuit ruled in Sangamon, Supra,

> "private approaches to members of Federal Communications Commission in connection with respect to allocation of...by parties interested therein Vitiated Commissions' cation allocating channel and proceedings.. must be reopened"

The ruling by the U.S. Court of Appeals for the Federal Circuit, with regard to the reassignment issue, is also

in conflict with Supreme Court precedent. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803), the court ruled:

> "... and this power has been exercised when the last act, required from the person possessing the power, has been performed..."

The effect of the Supreme Court decision in Marbury, supra, is reflected in its prominent citation in more recent cases involving the effecation of appointments to positions in government. See Gautos v. the United States, 552 F. 2d. 992 (1976) and National Treasury Employees Union, et al. v. Ronald W. Reagan, et al. 509 F. Supp. 1337 (1981).

The court ruled in N.T.E.U. v. Reagan, supra, citing Marbury, supra at pg. 1343:

> "In summary, it appears to be undisputed that two elements are necessary to establish when an appointment has been made. First, the last act required for

> an appointment must have been performed. Second, the person or body who performed the last act must have possessed the power to make the appointment if either of these elements is, lacking, there can be no "appointment." "

Both elements are missing in the instant case.

The ruling by the U.S. Court of Appeals for the Federal Circuit on reassignment is also in conflict with the Supreme Court ruling in the United States v. Testan, 424 U.S. 392, 402, 96 S. Ct. 955 (1976)

> "The established rule is that one is not entitled to the benefits of a position until he has been duly appointed to it."

The agency proposed removal on the basis of failure to accept a reassignment, despite the fact that the orders effecting reassignment were never prepared by the agency.

Reassignment is defined in 5 CFR Sect. 210.102 (b) (12) as follows:

> "Reassignment" means a change of an employee while serving continously within the same agency, from one position to another without promotion or demotion"

The fact that Ward was terminated from his position of Director, Philadelphia Regional Office, CPSC evidences ther no reassignment occurred.

Testimony of Mauna Kammer, Director of Personnel, CPSC, before MSPB reveals that no reassignment took place.

> "Answer: The actual reassignments would not have been cut because they failed to accept the positions. Its only when the employee accepts the position and enters on duty that you cut a Standard Form 50 which is our document to effect a personnel action which has taken place. If the action fails to take place, then the Standard Form 50 is not effectuated." (MSPB Hearing Transcript p.1283)

The Standard Form 50 is recognized government-wide as the instrument approved by the Office of Personnel Management (OPM) to record personnel actions. The agency's failure to issue Standard Form 50 to effect Ward's reassignment is not in conformity with the Office of Personnel Management's (OPM's) procedures contained in: Federal Personnel Manaul(FPM) 4-2a of Chapter 295, FPM Supplement 296-31, and FPM Supplement 296-31, pg. V-27. The previously cited testimony of CPSC's Director of Personnel indicates that the Standard Form 50 is the form that would have been used had the reassignment been effected.

Given the Supreme Court rulings on the issues raised in this petition and the conflicting decision by the U. S. Court of Appeals for the Federal Circuit on the same issues, petitioner urges this grant Certiorari to correct the conflicts.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT IS CONTRARY TO OTHER APPEALS COURT DECISIONS.

The U. S. Court of Appeals for the Sixth Circuit in Cleveland Board of Education v. James Loudermill et al, 721 F. 2d. 550, affirmed the right to a pre-termination opportunity to respond. The decision in the instant case is in conflict with that decision.

The U. S. Court of Appeals for the D. C. Circuit held in Sangamon Valley Television Corp. v. United States of America and Federal Communications Commission, 269 F. 2d 221, that:

> "private approaches to members of Federal Communications Commission with respect to allocation of channel by parties interested therein vitiated commission's action allocating channel."

The fact that Dodge was an intermediary in the ex parte communication

should have no bearing. The United States Court of Appeals for the Federal Circuit stated, in pertinent part, in Sullivan v. Department of the Navy, 720 F. 2d 1271 (1983):

> "These ex parte communications were made corvertly and secretly, and the petitioner did not know they were being made. It should be pointed out Hall was Shugart's representative in handling handling petitioner's case. A communication to him was for all practical purposes a communication to Shugart himself...."

The Court of Appeals for the Federal Circuit stated in Sullivan supra, citing Camero v. United States, 375 F. 2d 777 (1967).

> "...ex parte communications by an adversary with those participating in a decision to remove a government employee from his employment invalidates the removal proceedings and entitles the employee to reinstatement with back pay."

The ruling of the Court of Appeals for the Federal Circuit in the instant

case is in conflict with its own decision in Sullivan, supra on the same issue. Accordingly, certiorari is urged by the Supreme Court.

III. THE APPEALS COURT MADE AN ERRONEOUS INTERPRETATION OF STATUTE REGARDING 5 USC Sec. 2302 (b) (2). (Prohibited Personnel Practices) AS IT RELATES TO ISSUE NO. III. IN THIS PETITION.

The Civil Service Reform Act of 1978, Public Law 95-454, 95th Congress established certain prohibited personnel practices which, if committed by an agancy, demands reversal of the action against the employee, notwithstanding the weight of agency evidence. (5 USC Sect. 7701 (c) (2) (B) (C).

The author of the MSPB Initial Decision seeks to limit the application of 5 USC Sect. 2302 (b) (2) to senators and representatives. Such restrictive reading of the statute does not comport with the

unequivocal statement of the congress in this very important section of the Act. The Appeals Court erred in affirming the MSPB decision concerning the allegation that the agency committed a prohibited personnel practice under 5 USC Sect. 2302 (b) (2).

The act by the deciding official of soliciting and considering the statements of Lowell Dodge while Petitioner was under consideration for the removal action rendered the action invalid, pursuant to 5 USC Sect. 7701 (c) (2) (B) & (C). Accordingly, reversal of the MSPB decision was the only legal option availablt to the Appeals Court.

This erroneous interpretation of law opens the personnel management system to buses the act seeks to prevent. Therefore, the Supreme Court is urged to grant the Petition for Writ of Certiorari

to correct the misinterpretation of statute.

CONCLUSION

Petitioner respectfully urges this Court to grant the petition and issue a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit to review the judgment that court entered against him.

Respectfully submitted,

Lacy B. Ward
124 So. 50th Street
Philadelphia, PA 19139
(215) 747-2440

Appearing pro se

AFFIDAVIT OF SERVICE

I, Lacy B. Ward, being duly sworn, depose and say that three true and correct copies of the foregoing Petition for Writ of Certiorari: were mailed by depositing them in a United States Post Office, Certified Mail with return receipt requested (postage prepaid), this_____ day of April, 1986 to:

Solicitor General
Department of Justice
Washington, D. C. 20530

_____
Lacy B. Ward

Appearing pro se

Subscribed and sworn to before me this_____day of April, 1986.

_____
Notary Public

APPENDIX

UNITED STATES COURT OF
APPEALS FOR THE FEDERAL CIRCUIT

LACY B. WARD & RENEA A. WEBB, Petitioners vs. U.S. CONSUMER PRODOCT SAFETY COMMISSION, Respondent.	No. 84-1776

O R D E R

A petition for rehearing and a suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is Ordered by the court that the petition for rehearing be, and the same is hereby, Denied.

The suggestion for rehearing in banc is declined.

FOR THE COURT

/s/ Francis X. Gindhart
Francis X. Gindhart, Clerk

January 15, 1986
Date

CC: Mr. Lacy B. Ward
Ms. Renea A. Webb

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LACY B. WARD & RENEA A. WEBB, Petitioners,	
v.	Appeal No.
U.S. CONSUMER PRODUCT SAFETY COMMISSION, Respondent.	84-1776

DECIDED: August 6, 1985

Before DAVIS, BALDWIN and KASHIWA, Circuit Judges.

PER CURIAM.

The decision of the Merit System Protection Board (Board), MSPB Docket No. PH)75280 10437, which upheld the removal of petitioners by their employing agency is affirmed on the basis of the opinion of the presiding official

of the Board.

The Board's decision that petitioners were reassigned is supported by substantial evidence. Since petitioners refused to accept their reassignments there can be no doubt that their removal promoted the efficiency of the service.

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

LACY B. WARD v. U.S. CONSUMER PRODUCT SAFETY COMMISSION	DOCKET NUMBER PHO7528010437
RENEA A. WEBB v. U.S. CONSUMER PRODUCT SAFETY COMMISSION	DOCKET NUMBER PHO7528010307

ORDER

Having fully considered the appellants' petition for review of the initial decision issued on April 13, 1982, and finding that it does not meet the criteria for review set forth at 5 C.F.R. Sec. 1201.115, the Board

hereby DENIES the petition.*/

This is the final order of the Merit Systems Protection Board in this appeal. The initial decision shall become final five (5) days from the date of this order. 5 C.F.R. Sec. 1201.113(b).

The appellants are hereby notified of the right under 5 U.S.C. Sec. 7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellants' receipt of this order.

FOR THE BOARD:

June 26 1984
Date
Washington, D.C.

/s/ Paula A. Latshaw
Paula A. Latshaw
Acting Secretary

*/ Appellants allege, inter alia, error by the presiding official in denying them the right to effectively present their case and in denying their motion for certification of an interlocutory appeal to the Board. The record, however, does not support appellants' allegations.

(Footnote continued on next page.)

(Footnote continued)

*/ Regarding the presentation of their case, appellants called certain witnesses who were also called on behalf of the agency. The presiding official informed appellants that he would not restrict their examination of those witnesses at the time were called by the agency to testify and that those witnesses would be recalled only for good cause. Hearing Transcript at 4-5. We find no error in that ruling. See 5 C.F.R. Sec. 1201.41.

Also, we find no error by the presiding official in denying appellants' motion for certification of the interlocutory appeal. Appellants' motion was based on the presiding official's decision not to treat appellants' reassignments and removals as separate, independent adverse actions. Since a reassignment is not an adverse action appealable to the Board under 5 U.S.C. Sec. 7512, it can not be treated as an independent adverse action. Thus, there was error by the presiding official in denying appellants' motion on this basis.

CERTIFICATE OF SERVICE

I hereby certifiy that copies of the foregoing OPINION and ORDER were sent by certified mail this date to the following:

Lacy B. Ward
124 South 50th Street
Philadelphia, Pennsylvania
19139

Renea A. Webb
2506 Pine Lake Village
Lindenwald, New Jersey
08021

by regular mail to:

Alan C. Shakin
Associate General Counsel
U.S. Consumer Product
Safety Commission

Office of Personnel Management
Attn: Appellate Policies
Branch Room 7P56B
1900 E Street, N.W.
Washington, D.C. 20415

by hand to:

Office of the Special Counsel
Merit Systems Protection Bd.
1120 Vermont Avenue, N.W.
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Date
Washington, DC

Paula A. Latshaw
Acting Secretary

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
PHILADELPHIA REGIONAL OFFICE

LACY B. WARD
RENEA A. WEBB

v.

U. S. CONSUMER PRODUCT SAFETY COMMISSION

Initial Decision Number: PHO7528010360
PHO7528010307

Date: 13 April 1982

INTRODUCTION (1)

By individual petitions dated January 2, 1980, appellants Lacy B. Ward and Renea A. Webb sought to appeal the actions of the Consumer Product Safety Commission (CPSC), Washington, D. C., which, on May 23, 1980, directed their reassignments from positions in Philadelphia, Pennsylvania, to Washington, D. C., and Cleveland, Ohio, respectively. Appellant Ward had encumbered the Area Director, GS-15, position in the Philadelphia Area Office (PAO) and was reassigned to a Program Manager (Fire Hazards), GS-15,

position at CPSC headquarters in Bethesda, Maryland, while appellant Webb had encumbered a Senior Compliance Officer, GS-13 position and was reassigned to the same position and grade in the CPSC Cleveland, Ohio Area Office. The reassignment letters which are part of the agency file submitted August 22, 1980 noted that the action was being taken for sound management reasons prompted by "... progressively increasing incidence of management-employee tensions, discord, distrust and low employee morale and a lack of meaningful communication" in the PAO. (2)

Prior to the date appellants filed these directed reassignments appeals, CPSC had, on June 24, 1980, proposed the removal of appellants based on individual notices dated June 18, 1980, that appellants' declined to accept their directed

assignment. In due course, and on September 20, 19820, the agency issued decision letters to appellants, removing them from their positions for refusing to accept reassignment.

By letter of September 12, 1980, counsel for appellants submitted copies of the agency decision letters to this office and asked that removal appeals be accepted. He further requested that consideration be given to consolidating the appeals because of nearly identical issues. Counsel also argued, in that and subsequent letters responding to a Board Show Cause Orders regarding jurisdiction, that the reassignments should be accepted for adjudication by the Board as separate adverse actions, with the right of a hearing.

By letter of October 27, 1980, I notified counsel for appellants that I had been designated the presiding official in both cases, that I had considered and granted his request for consolidation, (3) but that since I did not consider the reassignments to separate, appealable adverse actions with right to a hearing, I was redocketing both reassignments appeals as removal appeals, effective September 12, 1980. (CAF #1, Tab 4). Appellants' counsel then filed a Motion for Certification, Interlocutory Appeal, on November 4, 1980, on the issue of Board jurisdiction of an appeal from a directed reassignment as a separate adverse action. 5 C.F.R. Section 1201.12 (CAF #1, Tab 5). By Order dated November 10, 1980, I denied the Motion. (CAF #1, Tab 6).

On November 14, 1980 appellants' counsel filed a Motion for the Production of Documents, requesting that the agency produce, as soon as possible, documents and material outlined in three (3) discrete categories, with forty-nine (49) separate sub-categories. (CAF #1, Tab 9). In an Order dated February 19, 1981 Order and that Discovery was completed. (CAF #3, Tab 16).

Early on in these appeals, specifically on January 12, 1981, the Office of Special Counsel, Philadelphia Field House, filed a Notice of Intervention pursuant to 5 U.S.C. Section 1206(i) and 5 C.F.R. Section 1201.34 (CAF #1, Tab 25). At a pre-hearing conference held on January 16, 1981, attended by Special Counsel representatives, discussion indicated that intervention was proposed because prohibited personnel practices

had been alleged and were to be investigated. (Transcript January 16, 1981, pp. 3-10). Special Counsel representatives participated in the preliminary stages of these appeals, filing responsive pleadings and attending and participating in the second pre-hearing conference held on May 20, 1981. On June 1, 1981, Special Counsel filed a MOtion to Withdraw Intervention citing insufficient reason for continued participation in the proceedings (CAF #2, Tab 64). By Order dated July 14, 1981 I granted Special Counsel's Motion to Withdraw. (CAF #2, TAb 84).

By notice of August 7, 1981, I informed all parties that the hearing requested by appellants was scheduled to begin Tuesday, September 15, 1981, but that it would be preceded by a final pre-hearing conference scheduled for Wednesday,

September 9, 1981. (CAF #3, Tab 17, 18). Notwithstanding appellants' filing of Civil Action 81-3638 in the U. S. District Court for the Eastern District of Pennsylvania on Friday, September 4, 1981, in which they sought a Temporary Restraining Order and Preliminary Injunction against the Board's convening of the scheduled hearing, the pre-hearing conference and hearing were held as scheduled. (CAF #3, Tab 36). The hearing was concluded on October 22, 1981 and post-hearing briefs were timely filed by the parties prior to the December 15, 1981 date for closing the record. (CAF #3, Tabs 53, 54).

JURISDICTION

Under 5 U.S.C. Section 7701(a), an employee may appeal to the Merit Systems Protection Board from any action which is made appealable to the Board under any

law, rule, or regulation. By virtue of 5 U.S.C. Section 7511(a) (1)(A), 7512(1) and 7513(d), any employee in the competitive service who is not serving a probationary period may appeal a removal action. The record shows that the appellants were employees in the competitive service, that they were not serving in a probationary period, and that they were removed from their positions with the Consumer Product Safety Commission. Accordingly, I find that these appeals are acceptable for adjudication.

ANALYSIS AND FINDINGS

This agency action was taken in accordance with the provisions of 5 U.S.C. Section 7512 and Part 752, Subpart C, of the Office of Personnel Management regulations, 5 C.F.R. Section 752.301. The agency, therefore, must comply with the burden of proof established by 5

U.S.C. Section 7701(c)(1)(B). In order for the Board to sustain removal of the appellant, the agency must first prove by a preponderance of the evidence that the appellants did refuse the directed reassignment as charged in the June 24, 1980 letters of proposed adverse action. Assuming that the agency meets that burden, it must then establish by a preponderance of the evidence that the action taken will promote the efficiency of the service. 5 U.S.C. Section 7513(a). In this context, a preponderance of the evidence means "that degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as sufficient to support a conclusion that the matter asserted is more likely to be true than not true." 5 C.F.R. Section 1201.56(c)(2).

On May 23, 1980, appellants and two other managers in the PAO were issued notices directing their reassignment to positions in other agency offices. The agency determined that replacing the entire management team at the PAO was absolutely necessary to institute stability in an otherwise deteriorating management-employee atmosphere in that office.

During the years 1978 to 1980 the agency was expending an inordinate amount of headquarters' time and assets in investigating and resolving problems relating to union/management relationships in the PAO. The office was poorly functioning and was poisoned with an atmosphere of hostility, fear, and distrust, which CPSC executives perceived to be directly attributable to poor management, specially appellant Ward's inability to carry on a reasonable

working relationship with his supervisors and subordinates. Continued union complaints which resulted in the filing of Unfair Labor Practice (ULP) complaints against the agency, and appellants' resistance or outright refusal to accept direction or guidance from agency executives, coupled with overall marginal performance of the agency's assigned mission, led the agency to conduct audits and reviews of PAO, which ultimately led to a directed reassignment of the four supervisors.

The first agency witness, Raymond J. Labonski, testified on a direct examination that he has been an investigator in the PAO since 1973 and has known and worked for appellant Ward since that time. Shortly after the union was voted in and the local formed in 1977, Labonski was elected president, a

position he continues to hold today. In his union capacity he filed a number of ULPS against the agency regarding events that occurred in the PAO, including inter alia, one involving employee utilization of government-owned automobiles during a SEPTA strike (H. T., pg. 103); a directive requiring secretaries to submit work reports every 15 minutes (H.T., pg. 104); the inexplicable probationary termination of an employee who had been commended by appellant Webb for outstanding performance (H.T. pg. 111); the failure to negotiate the institution of a no smoking policy in the office (H.T. pg. 117); the retaliatory assignment of the witness, Labonski, to a one month detail in Pittsburgh, Pennsylvania, at a time when his wife was about to deliver their first child (H. T. pg. 127-146); a denial of leave to an employee who was ill and in need of

hospitalization (H.T. pg. 154-165)1; and the initiation of a civil libel action against an employee by appellant Ward. (H.T. pg. 171).

Regarding the ULP charge filed because of his one-month temporary detail to Pittsburgh, Pennsylvania, Labonski, testified that his wife had medical problems which caused her to miscarry five times within a very short period. In December 1977 she became pregnant and required daily medication to carry to term. Because he was needed to do a lot of the household chores and wanted to be available when she delivered, Labonski spoke to Raymond Benson, the PAO Director of Operations, in the spring of 1978 requesting he not be sent on travel assignments during the latter part of his wife's pregnancy. On July 10, 1978 Frank Krivda, the Supervisory Investigator,

informed Labonski that Ward wanted him (Labonski) to be detailed for one month to the recently vacated investigator post in Pittsburgh, Pennsylvania. Labonski protested to Ward but to no avail, and so arranged with his supervisor to limit his out-of-town assignment to two weeks, with the understanding that the remaining two weeks would be completed by Gary Armbrust, a GS-11 investigator who was willing to take the assignment. After a Monday morning meeting two weeks later, attended by Armbrust who was packed and ready to leave, Labonski was told by William Robinson that Ward had directed that he returned to Pittsburgh for the remaining two weeks. Labonski obeyed the order and returned to Pittsburgh. (H.T. pg. 128-137).

Several months later he talked to Maria Jaurique, the PAO Consumer Affairs

Officer, who informed him of certain conversations she had with Ward. This new information led him to conclude that the Pittsburgh detail was retaliation for his union activities. (H.T. pg. 137-140). The resulting ULP charge regarding this incident led to a finding by an ALJ that the agency was guilty of an unfair labor practice. (Agency Exhibit #1).

Labonski testified, with regard to the McMahon probationary termination which resulted in the filing of a ULP, that in March 1978 he was approached by McMahon who told him she had been contacted by a labor relations officer from CPSC headquarters and told she was about to be fired. The employee requested union representation. Labonski filed an FOIA request and contacted Ms. Davis, the headquarters labor person, who refused to give him any information on orders from

Ward. Labonski contacted Ward and was told a meeting would be held the following Friday, March 10, 1978. (H.T. pg. 105-108).

At a rather loud meeting attended by Labonski, the employee, and both appellants, Ward made it clear that he was talking only to the employee and apparently ignored Labonski. Ward gave the employee her termination notice, whereupon Labonski said he wanted to talk about the action. Ward refused, stating the girl is going to be fired. Ward then told Labonski and the employee to leave. (H.T. pg. 108-109).

Labonski testified further that on the termination notice Ward directed that any questions concerning the matter he referred to Ms. Davis, the headquarters labor person. Labonski called her but

was told again that she could not talk to him. He then placed a call to the CPSC Chairman but got no response. Next he called the Acting Executive Director for Field Operations, AEDFO, Mr. Delgado, who said he would see if he could get someone to look into the problem. (See Delgado's testimony, infra, for a discussion on his participation in this action.) Early the following week, when it was apparent he was not getting any response from the CPSC, and Ward would not talk to him, Labonski went to the U.S. District Court to get a Temporary Restraining Order (TRO). He went to court because the employee was never told she had any problems with her work, she had in fact been complimented during her almost one year of employment for outstanding performance, and because Labonski felt no effort was made to correct any alleged

deficiencies in her work. (H.T. pg. 109-112).

At a Tuesday meeting with Judge Broderick, a hearing was set for Friday, March 17, 1978. After about an hour and a half of testimony, the judge asked both sides to meet in his chambers where an agreement resolving the dispute was reached. The agreement provided that the employee would be permitted to work two more weeks, that she would "resign," effective the end of that period, and CPSC would withdraw from the record any documents pertaining to her "termination." (H.T. pg. 112-114).

Labonski went on to testify that fear and tension characterized the atmosphere in the PAO; fear because when the Management Review Team (MRT) arrived from headquarters a meeting of the entire PAO

staff was held at which Ward said he was going to get everything that was said to the team members and "take it all the way"; and tension because the entire staff was aware that Ward had sued the Community Relations Officer, Maria Jaurique, for libel. Employees felt threatened by Ward for what they might say to the review team, especially since they knew Ward had already filed a private libel action against one of their number. (H.T. pg. 170, 171, 198-200). Maria R. Jaurique testified that she was an employee of the CPSC from May of 1974 to January 1981. In January of 1978 she transferred from Los Angeles to the PAO, after being selected by Ward for the Director of Community Services position, a one grade promotion. She answered to Ward directly, and characterized her working relationship with him as close. She ran all the community programs and

discussed her work with him. Because of their "real good" personal relationship, Ward apparently felt free to discuss anything with her including business and personal matters going on in the office. (H.T. pp. 231-233).

During a trip to Harrisburg in April 1978, Jaurique testified, Ward told her that Labonski was a troublemaker and was harassing him. Ward told her of the court case on St. Patrick's Day at which Labonski represented a secretary Ward had terminated. Jaurique did not know what to say and did not want to get too involved in the situation between Ward and Labonski. She testified she was afraid to talk to Labonski because of the picture Ward painted of him. (H.T. pg. 233-234). In early July Ward called her into his office, a meeting she thought was called to discuss her workload. Ward

began reading to her from a document Labonski had filed regarding a no smoking sign in the conference room. Ward told her that since it appeared that Labonski had nothing else better to do, he, Ward, was going to have him detailed to Pittsburgh for a month, adding he did not even have to do it himself, he would get the supervisor to do it for him. (H.T. pg. 235). Jaurique testified she knew Labonski's wife was pregnant and having difficulties and felt she should talk to him but was reluctant because she was concerned of the possible impact it would have on her. On July 25, 1978, while the witness and Ward traveled by train to Baltimore on CPSC business, he talked again about Labonski. Ward told her that he was upset with his subordinate supervisors because of a switch in his (Ward's) orders to detail Labonski for a month. Jaurique testified that she then

asked Ward if the detail would be a problem for Labonski since his wife was pregnant and ready to deliver at any time, and Ward replied that he (Ward) was sent to Korea when his wife was pregnant, so why could he not detail Labonski to Pittsburgh. (H.T. pg. 236-237).

Ms. Jaurique then testified in detail about her subsequent problem with obtaining approved leave from Mr. Ward so that medical diagnostic and treatment procedures could be pursued. In 1976 she was hospitalized for tests that showed precancer cells of the female organs. In April of 1978 she experienced pain and bleeding while jogging. In October, on the orders of her physician, she decided to enter the hospital in New Mexico (to be close to her family) and being uncertain regarding her return to Philadelphia she decided to tell Labonski

what was going on in the office. Prior to this time she had applied, and gotten approval from Ward for the use of 128 hours of use or lose annual leave beginning December 21, 1978 through January 15, 1979. (See Agency Ex. #2, dated August 30, 1978).

Labonski warned her that she would probably have problems from Ward for her disclosures, but she agreed to submit a written statement regarding Ward's statements to her. She felt Labonski and his wife and child were being "played around with." In addition to informing Labonski and Gary Armbrust, Jaurique called AEDFO Delgado in headquarters and told him of the statement and its contents.

On November 15 the witness averred she had a meeting with appellants Ward and Webb at which time she told Ward she was

ill and in need of hospitalization for treatment. Ward advised her to submit the leave application and gave no indication there would be any work-related or other objections to its approval. Two days later, a Friday, Jaurique submitted two leave slips; one for annual and another for sick leave. The sick leave was to begin the following Monday, November 20, 1978 (See Agency Ex. #4). Before noon that same day her sick leave request was approved by appellant Webb, who was Acting Regional Director in Ward's absence. About 4 p.m. that day Webb and Jaurique were together when a call came from Ward, whereupon Webb took the call in her office. Webb returned to Jaurique's office shortly thereafter and asked for the approved leave slips. Jaurique returned them to Webb who marked the requests "disapproved". Jaurique was told that if she was not in the office

the following Monday she would be placed on AWOL or leave without pay. Webb gave no reason for suddenly reversing the earlier approval of the leave request. Jaurique protested to no avail that she was sick, had a fever for the past two weeks, and should be in the hospital.

Jaurique went to work the following Monday, November 20, 1978, still feeling feverish. Ward gave her a letter noting disapproval of her leave application for the week of November 20, 1978. (Agency Ex. #5). The witness showed the Ward letter to Labonski and asked that he try to do something for her. She was ordered to go to Delaware the next day and left on the 6 a.m. train. When she returned that afternoon she was scheduled to go to U.S. District Court with Labonski who had filed an action. At a hearing in the late afternoon of November 21, 1978 the

parties entered into an agreement before Judge Becker whereby Jaurique was permitted to go on sick leave, effective 8 a.m. the following day, November 22, 1978, with the stipulation that she provide the CPSC inter alia with certification of medical services provided during the leave period. (See Appeal Ex. #26). Because of the press of travellers during the Thanksgiving holiday week, Ms. Jaurique's departure from Philadelphia was delayed a week. (H. T. pg. 237-252).

According to the witness this was not the end of her dispute regarding approval of sick/annual leave. She returned to Philadelphia on January 8, 1979, at which time her leave approval was not resolved. The next day she went into work and asked for sick leave that afternoon to see her doctor, and annual leave to attend a job

interview. Ward approved the sick leave but denied the annual. She left the doctor's office at about 3 p.m. and went to the job interview anyway. Ms. Jaurique continually asked her doctors for notes to give to Ward because he wanted more and more documentation. On one of her visits to Dr. Oaks she overheard a telephone conversation between the doctor and Ward during which time Ward apparently kept asking questions concerning her health. She talked to Dr. Oaks about the conversation but never authorized him to discuss her condition with Ward. On a second occasion she was contacted by another of her treating physicians, Dr. Pontarelli, who told her that Ward had called for an appointment to discuss Jaurique's health. The doctor asked if she would permit her medical records to be released to Ward since he had requested them. Jaurique

refused to permit the doctor to release the records. In April of 1979, after transferring to the Dallas Office of CPSC, she was served with papers that showed that Ward was suing her for libel. (H.T. pp. 253-258).

Ms. Jaurique testified that PAO was a "pretty bad place to work," there was no cooperation, employees were divided into groups, the atmosphere was tense, and the work suffered a good deal. She could clearly see the difference between she worked in the Los Angeles and Dallas offices and saw how much work got done in those two offices.

The witness concluded by testifying that the two appellants were constantly in conference with one another and that an attitude of fear was obvious in employees who dealt with them. (H.T. pg. 260-

267). Appellants did not cross-examine this witness. (H.T. pg. 265).

Mary Groome Lewis testified that she is the Director of Community Services with the CPSC's PAO and has held that position since January 14, 1980. She was hired by War, whom she had met through her husband, and had a good working relationship with both appellants for the first two and one-half months of her employment. They had regular meetings to discuss work programs, meetings which Lewis described as both formal and informal. (H.T. pg. 373-377).

Toward the end of March 1980 Lewis became aware of problems in the office which had existed prior to her arrival and which Ward told her were labor type problems. She observed that, in general, tensions seemed to be growing. (H.T. pg 377-378).

On an occasion when Webb was acting Director in Ward's absence, she and Lewis met with some differences of opinion regarding the scheduling of her (Lewis') activity. Specifically, Lewis testified, she was involved in a community information and education program regarding skateboards which required the submission of a written plan. Lewis submitted the plan to Webb at about 3 p.m. and at approximately 4:20 p.m., Webb called Lewis into Ward's office for discussion. Webb observed some problems with it as it was written. Lewis did not take her notebooks into the meeting because she thought, due to the lateness of the hour, they would go over the plan briefly and continue the discussion the next day. What followed was a line by review of the five-page plan of action with Webb objecting to such things as

pages not being numbered poorly, certain words misused or not fully explained, and estimated briefing times omitted. With respect to the briefing times, Lewis responded to Webb's inquiries by estimating "off the top of her head" the time she thought it would take to complete the various presentations. Webb took notes and at the conclusion of the meeting, about 6:15 p.m., she added up the time and said it exceeded the time allowed for the entire program. A confrontation occurred when Lewis picked up Webb's notes on the allocation of briefing times, and Webb became very upset, accusing Lewis of removing private papers from her desk. In any event, the plan was resubmitted the next day. (H.T. pg. 379-384).

Lewis testified that she attempted to discuss the skateboard incident with Ward

but he was always unavailable, either in conference or out of the office. She saw the futility of putting a memo into Ward's "in" box since it would probably not get past Webb, so she sent a letter to Ward's home. The letter described the skateboard incident and complained that Webb's treatment of her (Lewis) was non-professional and insulting. The resulting discussion she had with Ward focused on what Ward perceived to be charges Lewis was bringing against a fellow employee, Webb. He asked documentation for the insulting and non-professional treatment but Lewis saw no point to it and dropped the matter. (H.T. pg. 392-394).

Lewis went on to testify further deterioration of her working relationship with Ward. He no longer stopped by her office for discussions, but rather would

call her into his office for talks. She would be questioned closely about programs, and when she would request time to retrieve her files, Ward would refuse, saying he felt it was not necessary; she should be able to answer questions off the top of her head rather than first reviewing the files. Ward would question her in "machine gun" fashion, not hiding his annoyance when answers were not immediately forthcoming. (H.T. pg. 387-390).

Lewis also testified of another incident with Webb regarding an initial briefing she gave to a newly hired Junior Compliance Officer. Webb had given Lewis at a time at which to schedule the briefing but later cancelled when a conflict arose. Lewis then rescheduled the session at a time convenient to herself and the employee and put a note

to that effect on Webb's desk two days before the briefing was to take place. At the appointed time Lewis gave the employee a one-and-one half-hour explanation of her division. Later that day Webb told Lewis that the briefing was not official, since she (Webb) had not scheduled it and had not been present when it was given. Lewis testified that as far as she was concerned the briefing was completed. (H.T. pg. 395-398).

In concluding her testimony Ms. Lewis opined that she observed divisions in the office and although she tried to remain neutral, she thought Ward felt she was against him. It was perceived that you had to be on one side or the other, there was no neutrality. There was increased tension in the office and more and more derogatory comments made my staff members

against both Ward and Webb. (H.T. pg. 395-398).

In concluding her testimony Ms. Lewis opined that she observed divisions in the office and although she tried to remain neutral, she thought Ward felt she was against him. It was perceived that you had to be on one side or the other, there was no neutrality. There was increased tension in the office and more and more derogatory comments made by staff members against both Ward and Webb. (H.T. pg. 410-411). Appellants did not cross-examine Ms. Lewis. (H.T. pg. 412).

William S. Robinson testified that since October 5, 1980 he has been a Resident Investigator with CPSC in Bridgeport, Connecticut. Prior to that time he was a supervisory investigator in the PAO. Robinson testified at length regarding

the method of management used by appellants, as he experienced it, and described the atmosphere of tension, discord and disharmony which existed.

Regarding a refuse bin program in which he was involved as an acting compliance officer, Robinson described confrontations he had with appellants beginning in about July 1979. At that time he and a headquarters attorney were attempting to get voluntary compliance from a bin user but were unsuccessful. They then went to the U.S. Attorney asking cooperation in obtaining an injunction. They had supplied copies of the CPSC file to the prosecutor and a hearing was scheduled for 1 p.m. on October 25, 1979. (H.T. pg. 430-445).

A few days before the hearing he received five memos, the originals of which were

in the prosecutor's file and which had been re-typed with different dates, and with changes not contained in his originals. A note attached to the memoranda showed they were from Webb and were marked for action. Robinson sent them back to Webb with a note that the U.S. Attorney had the originals, and the memos should not be changed. (H.T. pg. 45).

At 9:00 a.m. on the morning of the hearing Robinson testified he was called into a meeting with appellants. When he entered the room he saw a stack of files and was told by Ward that they were going to have a little talk and that he, Ward, aimed to get some answers. Robinson protested that this was not a meeting but an interrogation and requested representation. He then called CPSC Headquarters and talked to an assistant

to the AEDFO who told him to go back into the meeting, making notes, and call him if there were any problems. (H.T. pg. 446-7).

Robinson returned to the meeting whereupon appellants asked about the five memos. One of Webb's complaints was that some of the memos were signed W. S. Robinson, not William S. Robinson, his full name. Webb said there may be another W. S. Robinson around someplace, therefore to avoid confusion Robinson should sign with his entire name. (H.T. pg. 447-8).

Robinson testified that he told Webb "that's silly", at which point Ward then went through 40 of the 48 case file folders Robinson worked on, asking questions and "nit-picking" each file. Robinson kept protesting that he was due

in court at 1:00 p.m. but appellants ignored him. At 11:20 a.m. Ward looked at his watch, announced the time, and said he could not find five of the files. He told Robinson you have until 11:27 a.m. to get those files and put them in front of me. Robinson sat trying to think where the files might be when Ward asked him if he was refusing an order. Robinson then left the office, and with the help of Webb's secretary, found the files and turned them over to appellants. The meeting ended after three hours when it just "dissipated into nothing." (H.T. pg. 448-9).

Robinson went on to testify that in November, 1979, on a day that she was Acting Director, Webb came into his office to discuss a second refuse bin case he had worked on. Robinson's testimony was that it was past CPSC

practice to accept a notarized statement on company letterhead, rather than an affidavit, when a firm gave notice as to how they would correct a bin problem. Webb was aware of this practice but repeatedly asked him for the affidavit even after he explained to her that he had accepted the notarized letter instead. Even after he placed a call to the CPSC attorney who was handling the case she insisted on obtaining the affidavit. When Webb continued Robinson got up and left his office. He returned a few minutes later to find her still sitting there and still asking him for the affidavit. At that point Robinson said "this is stupid, nit-picking, and I don't have time for it. You will have to leave." (H.T. pg. 456-9).

On December 10, 1979, Robinson was called into Ward's office and given an envelope

containing a copy of an official letter of reprimand signed by Ward. (Agency Ex. #13). The two page letter read in part:

> I visited the U.S. Attorney's Office on November 21, 1979, to review the file furnished that office on Penn Treaty Refuse Removal Company. This visit was prompted primarily over the questions raised duringour meeting of October 25, 1979, and your reluctance and evasiveness in answering those questions. It was perplexing that you, a former compliance officer and supervisor, would supply documents to the U.S. Attorney such as those observed by me on my visit to that office on November 21, 1979.
>
> I am particularly concerned over the work product contained in the memoranda I observed in the U.S. Attorney's office which was typed, unsigned and contained handwritten notes on them. I refer specifically to memoranda of telephone conversation between you and Mrs. John E. Bannon dated 9-7-79 and 9-21-79. The submission of correspondence (documents) of this quality to the U.S. Attorney in support of a violation reflects unfavorably not only upon you as a responsible representative of the U.S.

Government, but this office and the Commission as well. Such carelessness and negligence on your part may well jeopardize the outcome of this or other cases. At a minimum, it leaves open to question our concern for the quality of work we produce as an office and Agency.

Despite my warnings on October 25, 1979, about your calling your supervisor "silly", you called her stupid and ordered her out of your office on November 14, 1979. This and other disparaging remarks and other acts of disrespect such as you exhibited during meetings on October 25, 1979, and November 14, 1979, unquestionably represent improper conduct of a Federal employee, especially one at your level of responsibility. In your acting and regularly assigned positions you are expected to serve as an example of respect, cooperativeness and high quality of performance.

Therefore, I am formally reprimanding you for your discourteous conduct to Ms. Renea Webb during the meetings of October 25, 1979, and November 14, 1979, and your lack of responsiveness to me during the meeting of October 25, 1979; also for your submission of documents

> to the U.S. Attorney which were not of a quality that is acceptable work product in this office.

Robinson averred that he had no knowledge that the letter of reprimand was forthcoming and Ward never discussed his (Robinson's) version of the WEbb incident prior to issuing the letter. (H.T. pg. 460). Robinson later filed a ULP with the FLRA respecting the issuance of the reprimand. The letter was later removed from his file and the ULP dropped. (H.T. pg. 466).

In further regard to the Penn Treaty refuse bin case, and in spite of Ward's comments in the letter of reprimand, Robinson testified the U.S. Attorney sent a letter of commendation, dated January 4, 1980, to Lacy B. Ward, in which Robinson was commended."...for his assistance, preparation, and encouragement in bringing this case to what will hopefully be a successful

conclusion." The prosecutor noted that Robinson helped to identify and prepare witnesses, assured prompt delivery of documents, and provided necessary information to anticipate and counter alleged defenses. (Agency Ex. #14, H.T. pg. 461).

Robinson went on to describe what he considered to be an appearance of isolation in the PAO, in that appellants spent most of their office hours sequestered from their subordinates. There was a feeling among the investigators and operations people that they had no access to Ward and Webb. Because of the reduced availability of appellants, items like overtime requests would sit on Ward's desk and not be acted upon. (H.T. pg. 468-470). Robinson described what he considered to be distinct lines of division among the

office staff, including the obvious union/management division, a division between mid-management and appellants, and perhaps a last less clear division along racial lines. Robinson characterized the atmosphere as tense, fraught with discord and disharmony, and which was an altogether unpleasant place to work. (H.T. pg. 472-473).

Raymond Benson, Deputy Director of the New York Regional Office of the CPSC testified that he first worked with Ward in 1963 at the Food & Drug Administration. When the CPSC was organized in May of 1973, he and Ward assumed positions at the PAO. Ward gave him his choice of positions with CPSC and, in fact, was quickly able to get him a promotion to GS-13. Benson held the position of Director of Operations, GS-

14, from 1976 until April 7, 1980, when he left the PAO. (H.T. pg. 504, 514).

Benson testified that he had what he thought was a very good relationship with Ward; he was given his choice of CPSC positions, and felt Ward had confidence in the job he was doing. About three years before he left the PAO, conditions began to change. Benson perceived Ward's displeasure with the operations function and saw a change in the relationship he had heretofore enjoyed. Ward became more unaccessible and oral discussions of Operations Division problems were replaced with a system of written memoranda. Benson concluded that Ward felt he, Benson, was not doing the job Ward expected. (H.T. pg. 513-514).

As the only GS-14 individual in the PAO, Benson testified that he believed he was

the second-ranking official in the office. Notwithstanding this fact, when Ward was absent, he would appoint Webb, a GS-13 compliance officer, as Acting Director, instead of Benson. Ward and Webb spent a great deal of their office time in conference together. Ward issued a memorandum outlining deficiencies he observed in the Operations Division, and assigned the Compliance Division (Webb) the task of overseeing the work of Operations. In effect Ward was giving Webb authority to review the Operations Division work product. (H.T. pg. 517-521, 582).

Ward continually found fault with the Division supervisors, emphasizing insignificant mistakes in investigation while failing to recognize good work products. Frustration and anger was the result. Often Ward issued strongly

worked memoranda criticizing the Division's work and delivered them in sealed envelopes with the typed notation "for addressee only". (H.T. pg. 524-7).

Benson testified at length regarding personnel difficulties in the PAO and the appellants involvement in those problems. He cited one instance involving a travel voucher submitted by Gary Armbrust. An ongoing activity within the office involved the recruitment of hospitals in a reporting program which required that Armbrust conduct a five day, on-site training program for appropriate hospital personnel. One institution, located some distance North of Pittsburgh entered the program but did not get on-line because of lack of training. In order to get the full five day training cycle completed Armbrust volunteered to travel on a Sunday. When he submitted his travel

voucher, Ward raised a number of questions that eventually led to a meeting. In that session, attended by Benson, Ward interrogated Armbrust on details of the trip in a fashion most repugnant to the witness. Benson testified he was most ashamed of himself for sitting by and allowing his subordinate to be interrogated in such a manner. Armbrust did no wrong and should not have been treated in such a manner. (H.T. pg. 536-7).

Benson averred that conditions get progressively worse in spite of his efforts to change them around. He had rationalized that if he worked harder things would improve. Benson began taking his problems home, and began to have mental and physical difficulties. He reasoned that since Ward was not happy with the situation in Operations it was

futile for him to remain Director of the Division. Benson debated asking for a transfer to another position in the office knowing that the voluntary downgrade could cost him five thousand dollars. An incident then occurred that caused Benson to cease debating and request the downgrade. A resident investigator in Richmond, Virginia called the PAO and informed Benson that his car had been vandalized and the battery stolen. Benson simply told the man he had to have a car, and suggested that he have it fixed by whomever he used for car repairs. Ward later called Benson into his office, appeared very angry, and complained that the procedure of obtaining three estimates for repair work had not been followed. Benson tried to explain that he made the decision because he felt it was more important to have an operating vehicle than suffer delay by

getting three estimates. Ward directed Benson to call the investigator and instruct him to take the car out of the garage. Benson complied but learned that the work had been completed. He told the employees to pay the bill, and Benson, himself reimbursed the employee for the costs. The next morning Benson went into Ward's office and asked for a downgrade to the Compliance Officer position. Ward told him to put it in writing and the request would be considered. Although Benson did not submit a written request it was never acted upon and he eventually applied for and was selected to the Deputy Director position in New York. (4) (H.T. pg. 542-4, Appell. Ex. #2).

With further regard to the PAO staff, Benson testified that there were differing and distinct groups which included blacks and whites, union - non-

union, and different levels of management. These divisions, along with other problems within the PAO had a detrimental impact on the work in the office. (H.T. pg. 549-50).

Gary E. Armbrust testified that he is currently an investigator for the CPSC assigned to the resident post in Pittsburgh, Pennsylvania. He worked in the PAO from 1973 until December 1979, when he transferred to his current duty station. During part of the time he was at PAO, Armbrust was vice-president of the union and participated in matters involving employee relations. Included in those matters was representing co-workers before appellant Ward. Specifically, he participated in the court case regarding Maria Jaurique's attempt to obtain approval to use sick leave, and on October 21, 1978, attended

a settlement conference with others before a U.S. District Judge. During the conference, and after much discussion, Ward was asked if he would grant Jaurique sick leave. Ward answered in the affirmative, but when the agreement was reduced to writing, Ward refused to sign it, and the U.S. Attorney signed for the CPSC. (H.T. pg. 732-736; also Appellant Ex. #26; enclosure #2, Civil Action No.. 78-3900, Stipulation Between the Parties).

In further regard to the Jaurique sick leave problem, Armbrust testified that on January 22, 1979, Jaurique came to him and advised that she had been asked to meet with Ward. Since she anticipated problems she asked Armbrust to accompany and represent her. At the meeting Ward appeared angry and asked Jaurique questions regarding her period of sick

leave and the medical reasons in support of the leave usage. In Ambrust's opinion Ward's manner was intimidating. Armbrust testified that his opinion was based on Ward's tempo of questions, his loud voice, and his obvious anger. AT one point Ward asked Jaurique to provide him with an additional doctor's certificate because he felt the entire leave period was not covered by the certificates of record. Ward instructed Jaurique to supply him with the certificate by the following Monday morning. Ambrust complained that the order was unreasonable because Jaurique was scheduled for out of town training, and at his request Ward extended the time by two days. (H.T. pg. 736-740).

Armbrust testified to personal confrontation he had with Ward regarding a business trip to Oil City,

Pennsylvania. In order to arrive at the participating hospital facility early on Early Morning, Armbrust traveled on a Sunday. Ward refused to give him compensatory time for the Sunday travel, reasoning that Armbrust's supervisor did not get Ward's prior approval for the time, and it could not be approved after the fact. Several memos were exchanged between Ward and Armbrust, and Ward's last words on the subject were essentially that he, Ward, was not approving the time and that he doesn't have to give any reason for the disapproval. (H.T. pg. 743-745). At a meeting with both Ward and Webb regarding the Oil City trip, Armbrust testified he was subject to a court type investigation with Ward asking detailed questions about the trip and Webb taking notes of everything that was said. Armbrust's two supervisors were brought in and

questioned. The entire episode was described by Armbrust as humiliating. He testified he probably worked harder for the CPSC during that two weeks than at any other time. Armbrust was not asking for overtime, merely for compensatory time on an hour or hour basis. (H.T. pg. 745-6).

With respect to the atmosphere in the PAO Amburst testified that Ward had no working relationship with union members in the office and that Ward perceived only two factions in the office; either you were on his side, in which case you were treated as an enemy. (H.T. pg. 749-750). Appelants did not cross-examine Armbrust. (H.T. pg. 762).

Francis J. Krvida, testified for the agency that since September, 1980, he has been a Supervisor Investigator with the

Dallas, Texas Office of the CPSC, after having been reassigned in May of 1980 from the PAO. Krivda testified to his part in the July 1978 one month detail of Labonski to the Pittsburgh residence office. Krivda felt he had authority to send Labonski for only two weeks and then have him relieved by Armbrust for the second two weeks. Krivda learned that his assumption of authority was in error when Ward angrily demanded to know why Krivda had not detailed Labonski for a month as he was ordered. Krivda's description of the episode was similar to that of prior witnesses and it concluded with testimony regarding the imposition of an oral reprimand to Krivda, ordered by Ward and delivered by Benson. Krivda protested the unfairness of the censure but to no avail. (H.T. pg. 791-802).

With regard to close working relationship between Ward and Webb, Krivda testified that when Webb first came to PAO in 1977 they spent about 40% of their time together. The amount of time they spent together increased until, in 1980, they were almost constantly in each other's company. At one point Ward issued a memo to Benson assigning Webb the responsibility for reviewing the quality of the Operations Division's work. At the time Webb was the PAO Compliance Officer. (H.T. pg. 815-808). Appellants managed the office affairs with formal, often very critical memos aimed at pointing out violations in the Operations Division. When meetings were held they were like courtroom atmospheres, with note taking and one-sided conversations and no attempt at discussion or problem solving. (H.T. pg. conversations and no attempt at no attempt at discussion or

problem solving. (H.T. pg. 808-10). The effect of Ward and Webb's management techniques was to slow up the PAO Operations, specifically in the area of compliance. Oftentimes operations personnel had to be detailed into the Compliance Division so that cases, some old as 18 months, could be completed. (H.T. pg. 810-14). Krivda testified he had a stiff, formal relationship with Webb, and in all meetings with appellants, notes were taken and witnesses were present. Ward's manner of questioning was strident, like a judge coming down on a witness. (H.T. pg. 816-823, Agency Exhibit 16). Krivda testified that division among staff in the office affected the working relationship between appellant and employees and this conflict had a bearing on his decision to accept his directed

reassignment to the CPSC Dallas Regional Office. (H.T. pg. 834-840).

Alan H. Schoem testified that he is Assistant General Counsel with the CPSC and has been employed by the agency since June of 1973. In June of 1979, he was assigned to head a Management Review Team (5) (MRT), to look into problems in the PAO. Earlier, a Fact Finding Team Report (FFT) had been prepared to summarize a visit to the PAO. The FFT report presented a one-sided picture of conditions in the PAO and Schoem was charged with conducting a complete investigation to uncover facts rather than report on speculation and conjecture. (H.T. pg. 862-5). Team members reviewed the FFT report, spoke to Headquarters employees who had previously worked at the PAO, and then traveled to Philadelphia where they spent two weeks

interviewing PAO staff members. Schoem testified that his investigation revealed that of 52 allegations of misconduct or problems contained in the FFT report, most of them were simply not true and others were unfounded. For instance, an allegation that Ward did not hold staff meetings regularly was dismissed after Ward opined that as the Regional Director he had the prerogative to hold staff meetings or not hold them. Schoem's conclusion on this item was that Ward was absolutely right. Another claim involved suggestion of wrongdoing regarding the purchase of office decorations. Schoem's investigation showed that this accusation again, was simply not true. Schoem made the point however, that the truth of the associations was not the real issue, the fact was that many of the office staff believed them to be true. This belief typified the atmosphere in the PAO, an

environment, Schoem testified, he found to be so "...permeated with antagonism, distrust, dislike, maybe hate isn't even too strong a word, that it is questionable how the office could function and carry out the mission of the Consumer Product Safety Commission." Schoem's report concluded that decisive action had to be taken by the CPSC and he recommended that Ward, Labonski (the major antagonists), Krivda and Robinson be transferred. Webb's transfer was not recommended since the team felt that she could perform effectively as a Compliance Officer under a different supervisor. The MRT report was completed on May 2, 1980, and submitted to Edwin Trusworth the CPSC AEDFO. (H.T. pg. 872-8, Agency Exhibit #17).

Gary Cheatham, Chief, Labor and Employee Relations Branch, testified that he has

been with the CPSE since March 4, 1980. In the course of his duties, on April 20 or 21, 1980, he and Ronald Deutsch, an attorney from the General Counsel's office, traveled to the PAO for the purpose of meeting with Mr. Bailey and appellants. Bailey was conducting a Federal Labor Relations Authority (FLRA) investigation into a ULP filed in response to a reprimand issued by Ward to William Robinson and in which both appellants were named. Cheatham and Deutsch were to represent the agency and the appellants in responding to the ULP charge, and the purpose of the meeting was to review the charge, go over Ward and Webb's statements, and discuss the agency response to the charge. Cheatham and Deutsch met with Ward that morning, and then both appellants, together with the witness and Deutsch, went to lunch. At no time was there any disagreement as

to the strategy to be employed at the Bailey meeting. When Cheatham entered the meeting room with the others, Ward's secretary came in and took a seat. Bailey asked who she was and Ward told him she was there as a notetaker. Bailey said the meeting was not a hearing and, since Ward was represented by Deutsch and Cheatham, he saw no need for her to take notes. Mr. Ward insisted, and the meeting began. At the outset Ward stated he had a written statement he wanted to give Bailey, an action that took Cheatham and Deutsch completely by surprise. Neither appellant had given any prior indication that a written statement had been prepared and was to be given to the FLRA representative. Deutsch wanted to see the statement because of his position as representative for the agency and the appellants, and because he was concerned about its contents. Both appellants

insisted that Deutsch did not represent them, that they represented themselves, and then that Ward wanted his personal attorney to represent him. Seeing the impossibility of the situation Cheatham and Deutsch left. (H.T. pg. 995-1003). On cross-examination Cheatham testified that he was not aware of any prohibition against Ward and Webb having their own representative, but added that he knew that it was just not done. (H.T. pg. 1023-4).

Mauna V. Kammer, Director of Personnel for the CPSC testified that her department provides personnel services to the field, including a full range of Labor Relations services. The normal procedure was for Personnel to attempt to resolve labor relations problems in an informal manner so as to prevent the formal filing of a ULP. Guidance was

usually given to Regional Directors and their senior managers, however in the PAO the experience was somewhat different in that there seemed to be a reluctance on the part of Ward to accept headquarters direction and guidance. (H.T. pg. 1262-5).

Of particular note was Kammer's involvement with the Maria Jaurique sick leave request, the approval of which ward was reluctant to decide. The employee had a great deal of concern regarding her leave status because of the extraordinary expenses with which she was faced. As a result, Kammer was asked to take the unusual step of going to the PAO and reviewing the employee's leave record. There was evidence of lengthy periods of absence from work, most of which was covered by medical certification from various doctors. Ward believed, however

that Jaurique had been on two job interviews during her absence and he considered, and Kammer agreed, that it would be inappropriate to approve the use of sick leave for those two occasions. Kammer was hoping to find a solution to the problem which would be acceptable to both management and the employee. Kammer testified that she felt it not atypical, when people are faced with serious physical illnesses, cancer in this case, that they not cross all the "t's" and dot all the "i's" because of their personal anxiety. Her recommendation to Ward then, was to approve the use of annual leave for the two job interviews. On the sick leave issue, because not all of it was covered by medical certificates, Kammer suggested that Ward either try to get additional certificates, or have the employee herself certify that she was sick for the period not covered. This

method would comport with provisions of the Federal Personnel Manual (FPM) Chapter on Leave. Ward wanted a doctor's certificate for each and every specific day of absence and did not accept her recommendation. After further controversy Walter Johnson who was then Acting AEDFO took it on himself to authorize and approve all Jaurique's leave. (H.T. pg. 1266-73).
Kammer testified further that headquarters was singularly unsuccessful in planning strategy for defending against ULP charges with Ward. She noted that he filed responses to ULP's independently on one occasion, an action that is not compatible with the agency approach to resolving ULP matters. (H.T. pg. 1275).

With respect to the directed reassignments of appellants, Kammer

testified that she served in an advisory capacity to management. From the management reviews and studies done at the PAO, it appeared there was a very high level of employee anxiety, extreme animosity between employees and management, and an inability on the part of top management to function effectively as a team. In order to find a way to build a cohesive management team that could function effectively in terms of carrying out direction from headquarters, a number of alternatives were considered. Training, disciplinary action ranging from suspension to removal, and reassignment to other jobs within the agency were options considered by headquarter executives in their efforts to find a solution to the irreparable management problems in the PAO. The most appropriate solution was determined to be reassignment of the four managers at PAO,

and therefore vacancies were reviewed and positions found for the employees involved. Only in Ward's case was there any difficulty in that the only field positions at his grade were other Regional Director jobs. A Program Manager position at Headquarters was identified for Ward, a job that involved a coordinative rather than a supervisory role, and which was supervised by a strong manager capable of guiding and developing Ward in a way the agency thought was necessary. (H.T. pg. 1275-80).

With respect to the directed reassignment of appellants and their subsequent removal, Kammer testified that because appellants would not accept the reassignments they were issued notices of proposed removal based on their failure to accept reassignment. No SF-50's were

cut effecting the transfers because appellants refused to accept the reassignment. (H.T. pg. 1283-4).

The two other managers involved, Krivda and Robinson, accepted their reassignment, therefore appropriate administrative paperwork was completed, including the issuing of a SF-50 for each of them.

Edwin F. Tinsworth testified that he has been with the agency since 1973 and from November 1978 to November 1980 he was AFDFO at the CPSC headquarters in Washington. He was briefed by his predecessor and was otherwise aware of PAO problems regarding union disagreements and employee unrest. As an example of the immediate problem, Tinsworth testified he had to relieve Ward of all control of personnel actions

and vest approval authority for any such actions in himself. This action was prompted by a complaint he received soon after he assumed the AEDFO position. When Krivda called complaining that at a staff meeting Ward had said he was contemplating management and supervisory changes in the PAO. Withdrawing Ward's authority to approve personnel actions was a somewhat unique change in the Regional Director's authority and remained in effect for about one year. (H.T. pg. 1373-76).

Tinsworth testified that a great deal of time was consumed in discussing and evaluating various inspection reports generated by teams of headquarters staff who had visited the PAO. Although he was not involved in the events leading to the assignment of the teams, he had reviewed the reports and was aware of the problems

uncovered by the FFT and the Compliance Audit team (CA). Tinsworth's decision was to form the MRT and instruct them to examine the PAO and so that the problems and allegations could be finally put to rest (H.T. pg. 1376-8).

With respect to the CA report, it stated that the quality, quantity, and timeliness of the case work in PAO was far less than satisfactory. Tinsworth sent the CA report to Ward in July 1979 requesting his comments. Ward's reply contained no substantive comments to the report but challenged the legality of the audit and suggested that it had been conducted improperly. (H.T. pg. 1379-80, Agency Exhibits #21, 22).

In further regard to the CA, the resulting recommendations were widely circulated among the other CPSC field

offices to alert them to similar problems and to apprise them of suggested recommendations. One of the specific recommendations was to provide Webb with additional training to improve her performance as Compliance Officer. After negotiating with Ward regarding the timeliness of training, Webb was detailed to the NYC Office for two weeks in December of 1979. (H.T. pg. 1380-83).

Tinsworth also testified to his involvement in what is now called the Franked Envelope incident. On or about March 14, 1980, Tinsworth received a phone call from the PAO union president, Ray Labonski, telling him that Ward had gone to Baltimore to pick up copies of the ALJ's decision of March 5, 1980 which allegedly had been mailed in a government franked enveloped. Labonski was upset and threatened to go to the press but

Tinsworth was able to convince him of the irresponsibility of such an act. In any event Tinsworth left word that Ward was to contact him and the next day he called Tinsworth at home. Ward reported that an employee of the PAO had allegedly seen union persons using a government franked envelope to mail copies of the ALJ decision to the union person at the Baltimore, Maryland resident post. Ward had driven to Baltimore to retrieve the envelope, apparently as evidence of the alleged violation. Tinsworth sent a memo asking him to report what he knew about the incident, including who saw what and when it was seen. Ward responded that his informant was fearful of reprisal and he, Ward, would not identify anyone by name. Ward wanted to go to the Postal authorities immediately. After consulting with General Counsel and Personnel, Tinsworth told Ward not to

take any further action until he, Ward, responded to Tinsworth's first memo asking for the facts on the incident. Ward sent a second memo which was still not responsive. Finally at a meeting on April 3, 1980 in the Washington office of Mr. Gross, the Executive Director of the CPSC, Ward reported the facts surrounding the incident, while still maintaining the anonymity of his informant. Ward subsequently prepared a detailed memo dated April 9, 1980, but omitted the informant's identity. Tinsworth's final resolution of the incident was to inform all employees of the prohibition against the use of franked envelopes for other than government purposes. The union was advised that further violations would be dealt with severely. (H.T. pg. 1283-90, Agency Ex. #24, 25).

Tinsworth went on to testify of other problem areas discussed at the April meeting, notably the ULP filed by Robinson regarding his official reprimand. Ward had recommended that Robinson be transferred out of the PAO to the Baltimore residence post and this issue was considered at the meeting. A decision was reached that Robinson would not be transferred, and that the reprimand would stay in his record. The CPSC would support Ward by fighting the ULP filed by Robinson. another of the meeting topics was a discussion concerning the implementation of an agreement that had been worked out with the union by the CPSC Labor Relations Staff regarding other union concerns at the PAO. Tinsworth approved of the agreement and felt that implementing it would help to diffuse the high level of anxiety and tension the agency was

experiencing with the union at PAO. Tinsworth wanted to present a unified front to the union and for that reason sought Ward's signature on the agreement. Ward was first reluctant and then refused to sign, at which point Tinsworth ordered Ward to implement the agreement whether he signed it or not. (H.T. pg. 1391-96).

In his March 1980 decision, the ALJ found two of the six ULP's were sustained and the agency was therefore faced with a decision of whether to appeal the entire decision, file limited exceptions, or not appeal at all. Ward was asked for his recommendation and sent Tinsworth a memo dated March 19, 1980, suggesting that exceptions be filed. The agency filed limited exceptions in spite of Ward's recommendation to appeal the entire decision. Later, the General Counsel's office learned that Ward had filed his

own exceptions to the decision, an action not in accord with agency policy. In the past Ward had been ordered not to file his own responses to ULP filed against the agency. Because of Ward's disregard of headquarters orders, Tinsworth prepared a memorandum for both Gross and Ward in which he concluded that Ward's actions were unacceptable and were inappropriate for a management official. (H.T. pg. 1396-1400, Agency Ex. #25).

After reviewing the MRT report of May 1980, Tinsworth testified that it was now time for the agency to take some decisive action. The levels of mistrust and hostility were high in the PAO and a lot of headquarters time and energy was spent solving problems that had little to do with the CPSC's mission. (H.T. pg. 1401-2).

On May 19, 1980, agency executives met for several hours in Washington to discuss the best way to handle the situation at the PAO. The participants, led by Mr. Gross, considered a number of alternatives including the recommendations of the MRT, and individual suggestions from the executives present. Adverse action, retraining, and transfer were discussed and a final decision made to reassign the four PAO managers with no loss of grade. Krivda would be reassigned to a position in Dallas, Texas, and Robinson to a Resident Investigator's post in Bridgeport, Connecticut. Webb was to go to the position of Compliance Officer in Cleveland, Ohio. Although Webb's transfer would temporarily allocate three Compliance Officers at that office, workload and anticipated staffing changes supported a need to fill that post. As

for Ward, he was to be reassigned to a vacant position in CPSC headquarters, Bethesda, Maryland, as the Program Manager for the Fire and Thermal Burn Team. Tinsworth testified that all four managers were qualified for the positions to which they would be reassigned. (H.T. pg. 1402-10, Agency Ex. #26).

In their examination of Tinsworth appellants asked about CPSC policy regarding private employees filing exceptions to an FLRA decision. Tinsworth testified that the ULP charge was against the agency, not any individual, and that the agency, through its representative, was to respond. Ward, according to Tinsworth, was advised and directed on several occasions that he was not to file exceptions as an individual. All Area Directors were advised, at least one year prior to this

incident, on how to handle ULP's and, specifically that the agency would respond to all ULP charges. Further, in a September 21, 1979 memo, Mr. Deutsch of the General Counsel's office recorded an agreement reached at an earlier meeting among Deutsch, Ward, and his attorney, Harry Gastley, to the effect that it was understood and agreed that Ward would not interject further into the ULP's understood and agreed that Ward would not interject further into the ULP's in process. In addition, Deutsch sent a letter to the FLRA on September 25, 1979, in which he restated that the CPSC General Counsel was the only representative for the respondent agency, and that Ward, since he was not a respondent, had no standing to participate as a separate party. (H.T. pg. 1442-47, Appeal Ex. #31).

Tinsworth admitted on cross-examination that the CPSC office in New York City (NYC) and the PAO was that the Regional Director in NYC was willing to work cooperatively with headquarters to try to solve the problem. Ward was not so willing. The reassignment of the management team was based on the agency's need to correct the management problems, as opposed to being based on individual job performance as such. The existing management team could not work well together, could not work with the staff, and could not work with the union (H.T. pg., 1553, 54, 70).

Richard A. Gross testified for the agency averring that he is the Executive Director for the CPSC and has been since November 13, 1979. Prior to that he had been the Chief of Consumer Protection Division, Department of the Attorney

General, Commonwealth of Massachusetts. ON his first day at the agency he was told of some of the problems at the PAO. He was given Ward's grievance file and asked to be the deciding official in a pending action regarding WArd's failure to obey a direct order. Ward had been instructed to make certain documentation available to the union president under the Freedom of Information Act and for a period of nine days had failed to obey the order and had no excuse for doing so. Gross wanted to turn a new leaf, to mitigate the grievance and make a new start with PAO. Therefore, he dismissed most of the charges against Ward, sustaining only the charge involving the aforementioned nine days delay. In further mitigation, Gross directed that the letter of reprimand be removed from Ward's file after only six months. (H.T. pg. 1602-05, Agency Ex. #28).

Considerable rumors and gossip concerning the PAO were discussed by headquarters staff but because his management style would not permit him to make management judgments on such information Gross dismissed it out of hand. He wanted to get to the office himself and see the situation firsthand. At his first opportunity, in early January 1980, Gross went to Philadelphia with Tinsworth. Gross spoke with Ward and his staff and held what he felt were very candid discussions. After lunching and meeting privately with Ward, Gross told Ward that he had his confidence as the Regional Director. He made a commitment to Ward that he would not rely on gossip, or read the prior reports generated by inspection teams. Gross told Ward he would rely on their mutual ability to communicate as adults. Gross settled on a decision to

make a new start, and felt he had established a good rapport with Ward. He looked forward to a speedy resolution to whatever problems that had existed in Philadelphia. He was wrong. (H.T. pg. 1605-07).

The ensuing period was not smooth. Ray Benson sought and received a transfer to NYC on grounds that the tension was so great in the PAO that he required medical treatment. Gross talked to Benson before approving the transfer and was told that disharmony in the office had ruined his ability to perform and that Ward was a central figure in that tension. (H.T. pg. 1607-8).

Then in early March 1980 a most disturbing event occurred that sent shock waves through the agency. A decision was reached regarding ULP charges filed

against the agency. The judge found that the union president had been punitively transferred at a time when his pregnant wife was about to deliver, and that an extremely ill woman had been denied sick leave. Gross read the opinion carefully and found that the hearing examiner had disbelieved Ward's testimony almost in its entirety. The union demanded that Ward post his apology on the bulletin board but he refused. Gross offered himself to apologize for the agency but the union rejected his offer. Ward wanted to appeal the ULP decision but Gross decided that the remedy, while unpleasant, was not aggrievous in that it required that the agency not take action against the union president without cause for adverse action, and that Ward or some agency official had to specify that no such action would be taken. (H.T. pg. 1609-10).

After some two weeks of consideration, Gross decided, and the CPSC Chair agreed, not to appeal unless the union appealed on the remedy. Gross felt there was no purpose in appealing on the facts since they had lost on credibility. Gross personally solicited Ward's views and Ward provided them in a letter to the Chair in which he suggested an appeal. The end result was that the union appealed the remedy and the agency did likewise. The agency chose not to appeal the findings. (H.T. pg. 1611-12).

Gross went to on to testify that another disturbing event occurred. Ward, who had a history of filing personal exceptions to ULP's and who had been expressly ordered in writing not to do so, filed his own exceptions as an individual. Gross explained that he believed Ward's

action was unacceptable because one agency management makes a decision, it must be supported by all managers. There is no freedom for individuals to appeal when they are not parties. Gross considered Ward's action directly insubordinate and unacceptable. (H.T., pg. 1613-14).

Gross testified about the franked envelope incident wherein two envelopes were allegedly used by union members to mail copies of the ULP decision to Baltimore and Pittsburgh. Gross considered the charge, if true, to be a serious violation of the law that should be dealt with appropriately. He was told that Ward had contacted employees who received the two envelopes to hold them until he would come, personally, to pick them up. Ward then drove from Philadelphia to Baltimore, on agency time

to collect an envelope. Gross perceived Ward's reaction to be fairly hysterical kind of behavior. He told Ward that the proper way to be fairly hysterical kind of behavior. He told Ward that the proper way to handle such an allegation was to provide all the facts to him, Gross, who would then relay the facts to General Counsel who could decide if referral to the Justice Department or Postal Inspectors was appropriate. Ward refused to provide the data requested on grounds of confidentiality of his informant, but still insisted on a full investigation. Gross advised Ward to calm down, stop running around collecting "evidence", and start exercising his responsibility as a manager by trying to bring harmony to the situation. (H.T. pg. 1614-16).

Another incident occurred subsequent to his January meeting with Ward involving a written reprimand given to Robinson by Ward. Gross reviewed the accusations against Robinson and found that the statements made to Webb, although they were not complimentary, were not extremely hostile. Ward's reprimand of Robinson appeared to be flimsy at best, and at worst sheer retribution for Robinson's participation in the ULP trial. Gross wanted to vacate the reprimand for two reasons; one it was simply utter fabrication, and two the agency was at risk of losing another ULP or being charged with anti-union animus. The reprimand looked to all the world like retribution for Robinson's union activity. Gross did not want the agency involved in a petty, blown-up controversy which he felt was contrary to good management practices. If Robinson and

Webb did not want the agency involved in a petty, blown-up controversy which he felt was contrary to good management practices. If Robinson and Webb did have words the situation called for conversation between Ward and Robinson, not a written reprimand. Gross felt that Ward overreacted and was somewhat out of control as a manager. (H.T. pg. 1618-22).

Gross testified that because Ward was directly insubordinate he asked General Counsel to advise him whether or not he could take adverse action or if other options were available. He felt the PAO was out of control, production was very low, compliance was poor and it was not a well run office. He pondered whether to shut the office or reassign all the managers. At the meeting attended by a number of headquarter executives, Gross

considered options presented and decided to reassign the entire PAO management team. Appropriate positions within the agency were identified and the reassignment letters issued. (H.T. pg. 1624-37).

In the reassignment notices appellants were given 15 days to respond. They failed to do so and were given additional time to reply. On June 18, 1980, both appellants responded declining to accept their directed reassignment. (H.T. pg. 1638-39, Agency Ex. #31, 32).

Because of their refusal to accept the reassignments, proposed removal notices were prepared and issued on June 24, 1980. (H.T. pg. 1642, Agency Ex. #33, 34). Since appellants removal from the PAO, the new management team has been able to both turn around performance, and

bring an emotional calm that was sorely lacking under Ward's leadership. (H.T. pg. 1649).

In his examination by appellants, Gross recalled a further incident in which Ward was involved. He testified that the agency had received a petition to decertify the union from a group of current and past PAO employees. At the April 3, 1980, meeting Ward told Gross that he knew nothing about the petition. Gross testified that Ward's denial was a lie. Gross ordered Ward to stay away from all such efforts to decertify the union because management has no business in directing employees in or out of unions. Although Ward assured Gross that he knew nothing of the decertification activity, and had not encouraged it, Gross learned that Ward had already had conversations with several of the people

who had filed the petitions and indeed continued to have such conversations after Gross warned him against doing so. Also, Ward later admitted to Tinsworth that he had lied about his involvement with the union decertification petition. (H.T. pg. 1683-84).

Susan B. King testified that she was Chairman of the CPSC from June 30, 1978, until January 30, 1981. She was generally aware, as were the other commissioners, of the problems in the PAO, and at specific briefings given her by the AEDFO she was informed in detail of the difficulties that plagued that office. In the spring of 1980 King learned that Tinsworth recommended all four managers in the PAO be reassigned to other positions within the agency in order to solve the problem. Her senior staff managers had concluded that there

were high levels of hostility and mistrust that could only be relieved by replacing the entire PAO management team. She concurred in the recommendations. (H.T. pg. 1747-50).

Two of the four reassigned accepted their change of duty station but when appellants refused their directed reassignment the agency was faced with the decision of whether to follow through on the terminations or consider an alternative course of action. The decision was to propose appellants' termination. After the proposed removals were issued, King testified, she assigned her senior staff person, Lowell Dodge, to review the record fully and to make sure that all relevant facts were of record. Dodge compiled and reviewed the record, and made recommendations. Dodge's recommendations concerned the issue of

the appropriateness of the reassignment and the subsequent removals, rather than an analysis of individual wrongdoing or competency. King took the Dodge file home and spent the better part of a weekend reading the record and composing a list of questions she wanted either Dodge or her staff to answer. On the following Monday morning King met with Deutsch to go over her notes. After carefully reviewing the record, and the answers to her questions, she discussed Dodge's recommendations with him. King then made her decision and directed that a letter be prepared notifying appellants of their removal on the basis of their refusal to accept the reassignments. (H.T. pg. 1752-60).

At the conclusion of the agency presentation of their case, the appellants called only two witnesses,

Jaime L. Delgado and Robert Q. Jenkins. Delgado testified that he has held various positions within the agency since 1976, one of them being his current job as acting AEDFO. Beginning in about September of 1978, a "flurry" of union activity regarding labor/management relations problems began. In a two to three month period, 4 to 6 ULP's were filed by the union. (H.T. pg. 1960-74).

Delgado testified generally regarding the organization and administration of Field Activities and to some of the specific difficulties he dealt with in the PAO. Regarding one incident, the Margaret McMahon termination, both appellants attended a Washington meeting participated in by Delgado and other staff members. The meeting had been scheduled to try to resolve some PAO problems. Delgado was somewhat disturbed

by what he characterized as a lack of cooperation among the parties. During their discussions, Mr. Jenkins attempted to learn all the facts in the McMahon matter so that he could give proper guidance on a final recommended decision. To that end he asked Webb a number of questions. Ward refused to allow her to answer. At one point, Ward and Webb left the meeting together, against the wishes of Jenkins, and when they returned Webb, herself, refused to answer any questions. Although he had some reservations regarding the termination action because of appellants' lack of cooperation, the final decision reached by headquarters was to back up the Regional Managers (Ward's) recommendation to fire McMahon. (H.T. pg. 2005-6, 2013-14).

Delgado testified to other situations which arose in the PAO in which he was

involved, and in which the final resolution was to defer to the Regional Director's recommendations. One was an investigator's request for a one month leave of absence to visit his ill mother somewhere out west. Delgado felt the request was reasonable under the circumstances. The leave would be without pay (LWP), of short duration, and was requested because the man's mother was apparently quite ill. Ward recommended against approving the LWP, reasoning that if the employee wanted to spend that much time with his mother he should be separated from the service. Delgado felt that Ward's suggestion was somewhat harsh, but because he was the day to day manager and should be supported, Delgado concurred in Ward's decision. (H.T. pg. 2015-16). Another personnel action Ward took that "raised my own eyebrows," Delgado testified,

involved an employee who at one time or another held three different jobs; Community Services Director, Compliance Officer and Operations Director. It was usually not the scheme in a regional office that one person move into and out of the three jobs, but because Ward documented his reasons for the changes, and since Ward was the day to day manager on the spot, headquarters supported his recommendations. (H.T. pg. 2017-18).

The last personnel action in which there was a question was the selection of Webb, by Ward, for the position of Compliance Officer. Delgado felt the action was an unusual step because historically, 95 percent, if not 100 percent of the agency's Compliance Officers were selected from among CPSC employees who were former investigators or supervisory investigators. It was "...very, very

unusual for a community services person [Webb's background] to be promoted to Compliance Officer." Delgado questioned Webb's qualifications for the job, specifically her lack of investigative background, but headquarters decided again to support Ward's recommendation and the selection was approved. (H.T. pg. 2018-19).

Delgado agreed that there was a high level of union activity in both the PAO and the NYC office but there were distinct differences in the way the confrontations were handled. In NYC the ULP charges appeared to be exaggerated, and smacked of harassment, while in the PAO, they seemed somewhat more credible. Also, the Regional Director in NYC was working closely with headquarters to solve the problems, while on the other hand the PAO Director, Ward, did not

offer headquarters the same level of cooperation. (H.T. pg. 2021).

Robert Q. Jenkins testified generally on administrative and organizational topics raised by appellants including the agency's decision regarding its selection of a recipient for the 1980 EEO award. Jenkins did suggest, in response to questioning by appellant Ward, that he concurred with Gross' decision to reassign the PAO management team since he felt that if there was ever going to be a resolution of the problem, the easiest way to resolve it would be to place all the officials involved in different offices around the country.

There is no dispute that the agency has the authority to reassign its employees, that the agency is vested with considerable latitude in assigning its

employees, and that it may take such action at any time so long as the reassignment is taken for the good of the agency. Craig v. Colburn, 414 F. Supp. 185 (D.C. Kan. 1976), affirmed, 570 F.2d 916 (10th Cir., 1978); Urbina v. United States, 192 Ct. Cl. 875 (1970), 428 F.2d 1280 (D.C. Cir. 1970); 5 U.S.C. Sections 3301, 3302; 5 C.F>R. Section 335.102.

With respect to the agency's discretionary authority to reassign its employees, and to take subsequent adverse personnel action for failure to accept the directed reassignment, the Board has long held that such action is appropriate. Ketterer v. U.S. Department of Agriculture, Federal Crop Insurance Corp., 2 MSPB 459 (1980); Ramos v. Federal Aviation Authority, 4 MSPB 446 (1980); Else v. U.S. Department of Justice, 3 MSPB 4785 (1980).

Specifically, the Board has found that the removal of an employee, for cause, upon his refusal to accept reassignment requires the agency to establish by a preponderance of the evidence that the removal will promote the efficiency of the service, necessarily requiring that the agency must make out at least a prima facie case regarding the propriety of the reassignment by showing: a legitimate management purpose for the reassignment, that the employee was given adequate notice of the reassignment, and that the employee refused to accept the reassignment. The burden of establishing a bona fide management purpose for the reassignment, by a preponderance of the evidence, rest with the agency. Ketterer, supra. Once the agency makes out a prima facie case, the burden of going forward with rebuttal evidence shifts to the employee, but the burden of

persuasion (more precisely the risk of non-persuasion) never shifts from the agency. Ketterer, supra, citing Losure v. Interstate Commerce Commission, 2 MSPB 361 (1980). However, once it is established or unchallenged that a reassignment was properly ordered due to bona fide management considerations in the interest of promoting the efficiency of the service, in accordance with agency discretion under 5 C.F.R. Part 335, the Board will not review the management considerations which underlie the exercise of agency discretion. Ketterer, supra, fn. #8; Vogel v. Department of Justice, MSPB Order No. DC075209035 (January 4, 1982); Wetsch v. Department of Agriculture, MSPB Order No. CHO7528110048 (November 24, 1981); Thomas v. Department of the Army, MSPB Order No. AT07528010028 (May 21, 1981); Stewart v. Department of Justice, MSPB Order No.

SE07528010022 (April 10, 1981); Hayden v. U.S. Department of the Interior, Bureau of Indian Affairs, MSPB Order No. DA075209132 (February 27, 1981); Barros v. Department of Agriculture, 3 MSPB 385 (1980); DeJoy v. Department of Health and Human Services, 3 MSPB 96 (1980); Ramos, supra; Else, supra.

In the instant case, from the evidence and testimony discussed, supra, all of which is largely unrebutted, (6) it is apparent that the agency was forced to take action to deal with rapidly deteriorating management/employee relations which it perceived as being exacerbated by an ineffective management team. Senior staff executives at the agency's Washington headquarters became increasingly involved in solving problems and easing tensions at the PAO, while the appellants on the other hand, were

obviously the leading figures in adding fuel to the fires of antagonism and discontent. During the period 1978 to 1980, the agency spent considerable time, effort, and resources in conducting reviews of the PAO, by three separate bodies, including the Fact Finding Team, the Compliance Audit and the Management Review Team. In addition, the agency was faced with problems of its PAO management team's obvious inability to effectively deal with inter-office conflicts, the appellants' substantially escalated personnel confrontations, notably the Labonski detail, the Jaurique sick leave situation, the McMahon termination, the Ambrust affair, the Robinson reprimand, and the franked envelope incident. Appellants failed to cooperate, failed to accept direction and otherwise attempted to obstruct the agency in matters relating to the Cheatham/Deutsch meeting,

their actions in decertification of the union and in attempting to submit individual responses to ULP's. The agency decided that the management team, including appellants Ward and Webb, had to be shifted, and replacement managers appointed who would respond to headquarters guidance and serve to further the agency mission.

The positions to which the four team members were reassigned were at the same grade and pay in which the individuals served at the PAO. Robinson and Krivda accepted their directed reassignments, while Ward who was offered a Program Manager's position, and Webb, who was chosen for a Compliance Officer position, both declined. According to the unrebutted agency evidence, both jobs offered to appellants were legitimate positions for which they would have been

well suited, based on their background and ability. Further, there has been no evidence offered by appellants which would tend to show that the directed reassignments were in any way designed to cause appellant to resign, or were otherwise prompted for reasons that were not legitimate and reasonable.

In light of the foregoing, I find that the agency has shown by a preponderance of the evidence that legitimate management purposes for reassigning appellants existed, that both appellants were given adequate notice of the reassignment, and that both appellants refused to accept the directed reassignments.

I next turn to appellants' arguments as contained in the joint closing brief. First, however, and as noted above,

neither appellant testified, and in fact called only two of a number of witnesses they had requested and who they indicated they had intended to call. It is clear that appellants are not bound to call any witnesses in response to the agency presentation, Lateef v. Department of the Interior, MSPB Order No. DC075209114 (June 11, 1981); however, it is equally clear that an adverse inference can be drawn when an appellant refuses to testify at a hearing in response to probative evidence offered against him or her. Book v. United States Postal Service, MSPB Order No. SLO7528u010067 (May 26, 1981), citing Baxter v. Paligiano, 425 U.S. 308 (1976). Notwithstanding Baxter, I shall not take an adverse inference from appellants' failure to testify, but I do take note that extremely damaging testimony of record stands unrebutted simply because

appellants did not attempt to challenge it on cross-examination or to rebut it themselves by offering their own live versions of incidents, on the record and under oath.

In their closing brief, appellants rightfully argue that the agency has the burden of proving by a preponderance of the evidence that it reassigned appellants and that appellants declined those reassignments. (Citations omitted.) Their argument then seems to hopscotch to a conclusion that since there was no proof that appellants were reassigned then they could not have declined the non-existent reassignment. Appellants apparently believe that since the appropriate administrative paperwork reassigning them from the PAO to Washington, D.C. and Cleveland, Ohio, respectively, was never issued, they were

not, for purposes of this appeal, properly and effectively reassigned. They therefore could not be removed for refusing a non-existent reassignment. In support of their argument, appellants cite 5 C.F.R. Section 210.102(b)(12) which defines Reassignment:

> "...[it] means a change of an employee, while serving continuously within the same agency, from one position to another without promotion or demotion."

The facts support a conclusion that the agency did reassign appellants by changing them from one position to another without promotion or demotion. By letter dated May 23, 1980, each of the appellants was individually informed that they were "...hereby reassigned..." from their positions in the PAO to positions thereinafter described by enclosed position descriptions. Appellants were further advised that the reassignments would not be effective until Monday, July

7, 1980, because of the requirement for relocation. The letters also outlined the managerial reasons which prompted the reassignments including "...tensions, discord, distrust, low employee morale and a lack of meaningful communication, that which finally...compelled [the agency] to make this reassignment in order to improve the managerial operations in the Philadelphia Area Office." Enclosures to the letters advised appellants, inter alia, that they were directed to complete the attached certificates [accepting or declining the reassignments] within 15 calendar days, and that failure to accept, or no action at all would result in the agency proposing their separation from the Federal Service. (Appel. Exs. #7, 24). By letters dated June 18, 1980, each appellant individually notified the agency that they declined to accept the

directed reassignment. (Agency Exs. #31, 32). By letters of proposed removal dated June 24, 1980, each appellant was notified that their removal was proposed for declining to accept the directed reassignments. (Agency Exs. #33, 34). Finally, by letters dated September 2, 1980, each appellant was informed by the Chair, Susan King, that the proposal to remove and their individual responses had been considered, and that the decision was to remove them, effective September 5, 1980. (Agency Exs. #35, 36, Appel. Exs. #91, 92). Appellants argue that in spite of this evidence showing their reassignment and then subsequent refusal to accept, that the agency still should have issued the appropriate paperwork evidencing the reassignment. "Apparently [appellants] view is that reassignment or change of duty station is like a marriage, not in effect unless

consummated. " Burton v. United States, 186 Ct. Cl. 172, 182 (1968), 404 F.2d 365, cert. denied, 394 U.S. 1002 (1969). Because they never reported to their respective positions in Washington and Cleveland, appellants argue there was no reassignment. Their distinction is not a distinction at all. If instead of proposing their removal, on June 24, 1980, the agency had issued the documents effecting their reassignment effective July 7, 1980, marked them as AWOL from their positions when they failed to report, and then proposed their removal for refusing reassignment and AWOL, they would be in no better position than they were on June 24, 1980, when the instant removal proposal was first issued. It would have been futile and would serve no useful purpose for the agency to issue documentation evidencing appellants' reassignment effective July 7, 1980,

because appellants had notified the agency on June 18, 1980, that they declined the reassignment orders. I conclude, therefore, and notwithstanding appellants' allegations to the contrary, that the agency did meet their burden of proof in that they did in fact direct appellants be reassigned to positions outside the PAO and further, that appellants' have shown no harmful error in this regard.

In addition to arguing the agency burden of proof appellants allege a number of affirmative defenses. Appellants in a pre-trial submission outline their affirmative defenses to include:

(1) RESPONDENT'S ACTION WAS ARBITRARY, CAPRICIOUS, MOTIVATED BY MALICE AND NOT FOR THE EFFICIENCY OF THE SERVICE.

(2) RESPONDENT'S ACTION WAS NOT IN ACCORDANCE WITH LAWS, AS FOLLOW:

(a) 5 U.S.C. Section 7513(a)
(b) 5 U.S.C. Section 8336
(c) First Amendment U.S. Constitution
(d) The Privacy Act
(e) Laws, rules and regulations of the Office of Management and Budget regarding the approval of agency forms
(f) Other laws, rules, regulations stated in (3) below.

(3) RESPONDENT'S ACTION WAS NOT IN ACCORDANCE WITH LAWS OR PROCEDURES, AS FOLLOW, WHICH RESULTED IN HARMFUL PROCEDURAL ERROR:

(a) 5 U.S.C. Section 7513(b)(2)
(b) 5 C.F.R. Section 752.404(c)(2)
(c) FPM Supplement 752-1, S4-5b
(d) 5 U.S.C. Section 7513(b)(1)
(e) FPM Supplement 752-1, S51b(1) & (2)
(f) 5 C.F.R. Section 752.404(b)(1)
(g) 5 U.S.C. Section 7513(e)
(h) FPM supplement 752-1, S4-7
(i) 5 U.S.C. Section 7513(b)(3)
(j) 5 C.F.R. Section 752.404(f)

(k) FPM Supplement 752-1, S6-4a
(l) Fifth Amendment, U.S. Constitution

(4) RESPONDENT'S ACTION INVOLVED PROHIBITED PERSONNEL PRACTICES, AS FOLLOW:

(a) 5 U.S.C. Section 2302(b)(2)
(b) 5 U.S.C. Section 2302(b)(4)
(c) 5 U.S.C. Section 2302(b)(6)
(d) 5 U.S.C. Section 2302(b)(8)
(e) 5 U.S.C. Section 2302(b)(9)
(f) 5 U.S.C. Section 2302(b)(10)
(g) 5 U.S.C. Section 2302(b)(11)

In their post trial brief appellants did not argue each allegation listed above, therefore I will review only those defenses discussed in their brief.

In accordance with 5 U.S.C. Section 7701(c)(2), the Board may not affirm an agency decision when that decision shows harmful error (7) in the application of the agency's procedures in arriving at a

decision, when the decision was based on any prohibited personnel practice, as described in 5 U.S.C. Section 2302(b), or when the agency decision is not in accordance with the law. The above reasons for reversal of an adverse action are considered to be affirmative defenses, and in accordance with Board regulations, 5 C.F.R. 1201.56, the burden of proof as to these defenses rests with the appellant. That burden must be carried by a preponderance of the evidence. In the Matter of Frazier, 1 MSPB 159 (1979); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Appellants begin their arguments in support of affirmative defenses by alleging that the removal decisions failed to comply with 5 C.F.R. Section 752.404(b)(1) which states in pertinent part:

> "The notice of proposal shall inform the employee of his or her right to review the material which is relied on to support the reasons for action given in the notice."

A review of the June 24, 1980, letters of proposed removal shows that they each state in the final paragraph:

> "The adverse action file will be available for your review during normal business hours in the Division of Personnel Management, CPSC, 5401 Westbard Avenue, Bethesda, Maryland 20207."

Although the wording of the advice contained in the june 24, 1980, letter is not verbatim to the regulation, there is no law, rule, or regulation requiring that it must. Furthermore, appellants have not shown that they were harmed by the alleged error. As a matter of fact, in a joint, 10-page, single-space typed letter to the CPSC Chair, dated August 1, 1980, appellants' opening sentence notes that on July 23, 1980, both appellants and their attorney reviewed the adverse

action files. (See August 22, 1980, Agency Submissions, Tab 5d). In response to appellants' allegation above, that "...the removal decisions were not in accordance with law," I find no error and dismiss the allegation from further consideration.

Appellants next argue that the September 2, 1980, decision letters do not indicate a specific reason for the decision to remove and further, that the decision notices contain evidence that reasons other than those stated in the advance notices were considered by the deciding official. Appellants charge that citation of new reasons justifies reversal of the action because appellants were not given any and all reasons in the advance notice.

Again, I find no error in the agency procedures used in effecting these removals. The reason noted in the June 24, 1980, letters was "...since you have declined to accept the reassignment, in order to promote the efficiency of the Government service, I am proposing to separate you..." In each of the September 2, 1980, decision letters Chair King wrote, "Your refusal to accept the reassignment is, in my judgment, without adequate justification. Therefore, it is my decision that you be removed..." Also, Gross testified that the proposed removals were simply related to appellants' refusal to accept reassignment, and King testified that as the deciding official she made her decision to remove based on appellants' failure to accept the directed reassignment. (H.T. pg. 1670, 1757). I conclude that appellants have not met

their burden on this allegation since it is clear that the articulated reason for proposing and then effecting appellants' removals was their failure to accept directed reassignments.

Appellants go on to charge that their due process rights under the Fifth Amendment to the Constitution were violated when, as they allege, the deciding official considered reasons not specified in the notice of proposed adverse action in violation of 5 C.F.R. Section 752.404(f). Appellants maintain that said consideration resulted in harmful procedural error because appellants had no advance notice of the reasons not contained in the advance notices, and therefore were denied opportunity to defend against said reasons. As noted above, in order to prevail in this affirmative defense appellants must show

harmful error. An agency's failure to follow regulations is not error if no harm is done to the employee by the failure to comply strictly with the letter of the regulations. McCallin v. United States, 180 Ct. Cl. 220 (1967). As noted above, the agency proposed appellants' removals for failure to accept directed reassignments, and ultimately removed them for the same reasons. No matter how appellants view the evidence or interpret the testimony, refusing reassignment was the sole reason charged and sustained. Testimony, reports, recommendations, and evidence of record dealing with the legitimate management reasons in support of the reassignment action deal only with that issue and are not determinative of the charge of refusing reassignment until such time as the removal action is appealed to the Board. It is obvious

that the agency was fully aware of possible challenges to the removal actions, and attempted to thoroughly document their deliberative processes in order to help validate their decision. Appellants' allegation that they were denied opportunity to defend against the charges is completely unreasonable and is not supported by the record. The discovery phase of this appeal covered many months, resulted in the agency producing many thousands of pages of documents, and a number of tape recordings. Many witnesses were approved, and some were subpoenaed. Additional records were supplied to appellant at the hearing, which began on September 15, 1981, and concluded on October 22, 1981. Over two thousand pages of testimony were reported. Appellants offered over 150 exhibits, and the agency 38 exhibits into evidence.

The adjudication of this appeal is hardly one wherein a party could convincingly argue that they were denied an opportunity to defend against the reasons for removal. At the hearing, appellants had every opportunity under the Board's rules to plead surprise and request wither a continuance of the hearing to present additional witnesses and evidence, 5 C.F.R. Section 1201.51(c), or that the record be kept open for the submission of additional statements, 1201.57(a). Owens v. Department of the Air Force, MSPB Order No. SF07528010464 (November 3, 1981). I find no evidence that the agency considered reasons not specified in the notice of proposed adverse action and this allegation is dismissed from further consideration.

Appellants also argue that the agency committed harmful procedural error when

it issued the proposed removal notices and failed to notify appellants of their right to answer orally or in person and failed to designate an official to hear the oral answer. I disagree.

On the second page, second paragraph of the individual letters of proposed removal dated June 24, 1980, the agency writes "[Y]ou may also request an oral reply within the ten calendar days," and on the next line notes "...requests should be submitted to Susan B. King...." The statute cited by appellants as being violated, 5 U.S.C. Section 7513(b)(2), reads in pertinent part:

> "a reasonable time, but not less than seven days, to answer orally and in writing..."

5 C.F.R. Section 752.404(c)(2) notes in pertinent part:

> "The agency shall designate an official to hear the employee's oral answer who has authority

> either to make or recommend a final decision..."

A person who pro se institutes and maintains...administrative appeals represents by implication that he is capable and competent of conducting his own affairs. Frommhagan v. United States, 573 F.2d 52 (Ct. Cl. 1978). In my opinion, appellants Ward and Webb are extremely capable and competent individuals, and as such, when they received and read the June 24, 1980, letters, they surely must have been put on notice that they had a right to an oral reply, and that such replies would be made to Susan King.(8) I find no support for appellants' allegation that the agency decision was not in accordance with law, or that it was tainted by harmful procedural error regarding this charge, and it is therefore dismissed from further consideration.

Appellants next allege a prohibited personnel practice, in violation of 5 U.S.C. Section 2302(b)(2), occurred when the agency deciding official solicited and considered recommendations, records, and statements of Lowell Dodge, her executive assistant.

5 U.S.C. Section 2302(b)(2) provides in part:

> "(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority...
>
> (2) solicit or consider any recommendation or statement, oral or written, with respect to any individual who unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of--
>
> (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or
>
> (B) an evaluation of the character, loyalty, or suitability of such individual."

With regard to her deliberations in reaching a decision to remove in these appeals, and Lowell Dodge's submissions to her, Chair King testified:

> A. I received from Mr. Dodge all of the materials that he felt were relevant to my review of the case for purposes of the decision before me. Those included internal staff memoranda, memoranda between headquarters and field, letters from attorneys for the appellants, various--what other category--correspondence, copies of official--the formal transmission letters, summaries of recommendations of the various fact-finding inquiries--not the inquiries--not in the full formal reports themselves. As I said, it was about an inch per appellant, plus a memorandum from Mr. Dodge. it was not--I did not receive a personnel file. I received materials assembled and orders, organized and collated for me by Mr. Dodge with an index of those materials and his own cover memorandum. (H.T. pg. 1824-25).
>
> ...
>
> A. Mr. Dodge was my number one senior staff person on my personal staff as Executive Assistant to the Chairman. He had the broadest range of

authority to speak for me and act on my behalf in the agency. In his capacity as an Executive Assistant, he as a matter of course handled the most sensitive and delicate matters that would have come before me, also those of a confidential nature and personal notes specifically. In many instances he would fully review a record, come to mew with a recommendation. I would not have to go through an entire set of papers myself on things. This is obviously for purposes of narrowing the issues to the matter before me for a decision, to be sure that all the relevant material is included and that all unnecessary material or issues are excluded. It is also a check and balance system, of course. (H.T. pg. 1834-35).

...

Q. When you requested that Mr. Dodge prepare the record, what exactly did you intend for him to do? For example, did you intend for him to further investigate, to consider the evidence, to make recommendations? What did you really expect him to do?

A. My request to Mr. Dodge was to assist me in compiling the material that I needed to review for purposes of making the decision which was then going to be before me as to

> whether or not to approve the recommendation of the proposal of the staff people to remove the two parties from service. Additional investigations are not contemplated, but in a check and balance system in a matter of this gravity, my purpose, of course, in having an individual staff member on my personal staff review the record and raise questions is, one, someone coming from a fresh perspective not emotionally or historically involved in the case; two, that recommendations of staff are looked at with new scrutiny, again to be sure that one doesn't rely solely on the advice and counsel of one person in such a matter; and, thirdly, to narrow the issues. (H.T. pg. 1835).

Appellants' allegation of a violation of 5 U.S.C. Section 2302(b)(2) is in error. The legislative history of the act plainly states that: "Paragraph (2) restates and expands 5 U.S.C. 3303, (9) which currently prohibits consideration of recommendations submitted by senators or representatives, except as to character or residence. The paragraph adds a prohibition against soliciting

such recommendations. An exception is made for recommendations based on personal knowledge or personal records, where it consists of an evaluation of work performance, ability, aptitude, character, loyalty, or suitability." (Emphasis added). (Senate Report No.95-969, 95th Cong., 2d Sess. 20). Chair King asked for and received a recommendation from her Staff Assistant Lowell Dodge, not from any Congressman or Senator. This allegation is therefore dismissed from further consideration.

Appellants next allege a prohibited personnel practice in violation of 5 U.S.C. Section 2302(b)(4) when they charge that the agency failed to consider them for the positions vacated when they were reassigned from the PAO. Simply put, appellants pray for reversal of their removals on the grounds that the

agency would not seriously consider their applications for selection to the jobs they had incumbered before being reassigned.

5 U.S.C. Section 2302 (b)(4) provides in part:

> "(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority....
> (4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;"

The Legislative history shows that: "Paragraph (4) and (5) prohibit deliberate deceit or obstruction with respect to an individual's right to compete for Federal employment, and prohibit influencing a person to withdraw from competition in order to assist or injure another's prospects." (Emphasis added). (Senate Report, supra, at 21).

Appellants were not deliberately or deceitfully obstructed from competing for Federal employment within the context of this case, especially in light of the candid testimony of Gross who admitted that he did not take their applications seriously. He testified that to put them back into the jobs from which they had been reassigned, would have undone all the work that the agency had gone through to restructure the PAO. (H.T. pg. 1727). I agree. To support appellants' contention would result in effectively eliminating an agency's discretionary authority in reassigning its employees. Appellants cannot cry foul, because the agency refuses to consider them for selection to the positions from which they had been transferred. I find that appellants have not shown that the agency committed a prohibited personnel practice.

Appellants next allege that their removals were based on a prohibited personnel practice under 5 U.S.C. Section 2302(b) (9). In support of this contention they cite the recommendation memo of Lowell Dodge dated August 9, 1980, in which he writes:

> "In challenging the directed reassignment, Webb has chosen to throw her lot in with Mr. Ward; their cases are being handled identically by the same attorney, Harry Gastley."
>
> "In short, keeping Webb in Philadelphia was not a viable alternative then (in May, when she was reassigned) and because of the identity of her legal defense with that of Ward, it is even less a viable option now."

Mr. Dodge, who could have testified regarding the reasons underlying the inclusion of these notations in his recommendation was requested as a witness by appellants and subpoenaed by ALJ McCarthy. Appellants abruptly closed

their case, however, before calling Dodge to testify.

5 U.S.C. Section 2302(b) (9) states in part:

> "(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority...
> (9) take or fail to take any personnel action against any employee or applicant for employment as a reprisal for the exercise of any appeal right granted by any law, rule, or, regulation."

To establish a violation of Section 2302(b) (9), an appellant must demonstrate that he or she engaged in an activity protected by the section; that he or she subsequently was treated in an adverse fashion by the employer; and that the deciding official had actual or constructive knowledge that the employee was engaged in the protected activity. The appellant must also demonstrate that there was a causal connection between the

protected activity and the adverse action and that the protected activity was a significant factor in the taking of the adverse action. (Emphasis added). Gerlach v. Federal Trade Commission, MSPB Order No. DC075280109020 (December 15, 1981), citing Frazier, supra.

After reviewing the evidence and testimony I find that appellants fall short of establishing the elements cited above. They have not established, for instance, that Webb retained Gastley prior to the May 23 directed reassignment; the declination of which eventually led to her removal. The agency has shown that appellants were reassigned, with others, only after serious conflicts arose between the management team, its subordinate employees, and that the management team and the agency's headquarters staff. The

Dodge statements objected to by appellants in their closing briefs could not have formed the basis for the agency decision to take removal action since that action was clearly taken because of appellants' refusal to accept their directed reassignment. Appellants have not demonstrated that they were engaged in a protected activity or that there is a causal connection between that activity and the adverse action.

Appellants' final argument is that the action was a violation of 5 U.S.C. Section 2302(b)(10), which provides in part:

> "(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority...
> (10) discriminate for or against any employee or applicant for employment on the basis of conduct which does not adversely affect the performance of the employee or the applicant or the performance

of others..."

In support of this affirmative defense, the appellants re-argue their previous contention that the agency failed to prove they were reassigned to positions in Washington and Cleveland, respectively, and that therefore the action violates 2302(b)(10) in that it lacks nexus, and was not taken for the efficiency of the service. This argument has been dealt with, supra, and will not be further considered.

Appellants have not shown by a preponderance of the evidence that the agency committed any prohibited personnel practices in effecting their removals or that the actions were tainted by harmful procedural error.

Although not raised in their closing brief, during the hearing appellants repeatedly objected to any and all testimony offered by agency witnesses regarding ULP's and that were part of this case. Appellants objected because they allege that the Board does not have jurisdiction to decide allegations of ULP's and also because appellant Ward has individually appealed in the U.S. Court of Appeals, Third Circuit (Case No. 81-1322). Because the ULP's are under consideration by the Court of Appeals, no testimony can be accepted on the administrative record. (H.T. pg. 120-1, and at many other places in the hearing testimony).

As I explained to appellants a number of times during the hearing, they are correct in their assertion that the Board does not have jurisdiction to decide the

merits of a U.L.P. Kauhine v. Department of the Navy, 4 MSPB 408 (1980). However, I also advised them that the merits of the ULP's were not at issue before the Board. The issue was the removal actions taken by the agency based on their refusal to accept the directed reassignment out of the PAO. In that regard, the agency was required to show, under Ketterer, supra, that they had legitimate management reasons for effecting the reassignments. In an attempt to show the conditions that existed in the PAO, the agency, in my opinion, was free to offer testimony regarding the ULP's and the part they took in the agency's decision to order the reassignments. See Bodinus v. Department of the Treasury, MSPB Order No. CHO7528010016 (August 27, 1981).

With regard to the penalty of removal imposed by the agency, I find it reasonable and appropriate under the totality of circumstances in this case. The Board and the Courts have previously held that removal was not too harsh or unusual a penalty for refusing reassignment. Else, supra; Coyne v. Bayette, 490 F. Supp. 292 (S.D.N.Y. 1980), (appellant custom agents abrasive encounters with airline personnel); Bramby v. Webster, 476 F. Supp. 351 (E.D. Pa. 1979) (FBI agents off duty conduct); Burton, supra, (lack of rapport with others); Hayden, supra, (disruptive effect of appellant's conduct); Kletschka v. Driver, 411 F.2d 436 (2d Cir. 1969) (appellant's strained personal relationship with staff).

Finally, with respect to the statutory requirement that removal actions be taken

only for such cause as will promote the efficiency of the service, 5 U.S.C. Section 7513(a), the Board has held that such actions, effected after refusal to accept directed reassignments, where, as here, the agency shows by a preponderance of the evidence that the reassignments were properly taken, the removal actions promote the efficiency of the service. Ketterer, supra; Ramos, supra; Else, supra; Thomas, supra; Stewart, supra; Hayden, supra; Barros, supra; Wetsch, supra, Dejoy, supra.

DECISION

The agency removal action is affirmed.

NOTICE

This decision is an initial decision and will become a final decision of the Merit Systems Protection Board on 18 May 1982 unless a petition for review is filed

with the Board or the Board reopens the case on its own motion.

Any party to this appeal, the Director of the Office of Personnel Management, or the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The petition for review must set forth specific objections to the initial decision, supported by references to applicable laws or regulation, and with specific reference to the record. The petition for review must be filed with the Secretary to the Merit Systems Protection Board, Washington, D.C. 20419 no later than the date set forth above.

After providing an opportunity for responses by other parties, the Board may grant a petition for review when it is established that:

(1) New and material evidence is available that, despite due diligence, was not available when the record was closed; or

(2) The decision of the Presiding Official is based on an erroneous interpretation of statute or regulation.

Under 5 U.S.C. Section 7703(b) (1) the appellant may petition the United States Court of Appeals for the appropriate circuit or the United States Court of Claims to review any final decision of the Board provided the petition is filed no more than thirty (30) calendar days after receipt.

For the Board:

William P. Butler

Presiding Official

1. This section will provide some context by condensing the events which occurred between the time these appeals were filed and the date the record was closed. Many of the pleadings and responses filed of record are not material to my initial decision and are not noted or otherwise included herein.

2. CPSC directed the reassignment of what is considered to be the entire PAO management team including Lacy B. Ward, Renea A. Webb, William Robinson and Frank Krivda. All employees were served with notice of reassignment on the same date, however, only Krivda (to Dallas, Texas) and Robinson (to Bridgeport, Connecticut) accepted the directed reassignment (H.T. pp. 1284).

3. See 5 C.F.R. Section 1201.36(a); Section 1201.55(b); Section 1201.12; MSPB Consolidated Appeal File (CAF) #1-Tabs 5, 10, 15 regarding CPSC request to respond to consolidated motion and their December 5, 1980 response which effectively does not object to the Motion. Further, appellants changed counsel three times and in January 1981, began representing themselves. AT the hearing appellants appeared pro se.

4. Benson continues to reside near Atlantic City, New Jersey and commutes six hours daily to New York City.

5. The MRT included John Gomilla, John Barrett, Roland Atley and Schoem.

6. During the hearing I advised appellants that the vehicle by which they may challenge the testimony of a witness is by cross-examination. (H.T. pg. 406, et al.). Cross-examination is

fundamental to the system of adversary administrative process and has been praised as beyond any doubt the greatest legal engine ever invented for the discovery of the truth. A witness' credibility can be challenged in an attempt to show bias or motivation to harm a party. Penetrating cross-examination can effect the weight of a witness' testimony or even impeach his/her credibility. United States v. Gamble, 662 F. 2d 834 (D.C. Cir., 1981), citing Watkins v. Sowders, 449 U.S. 341 (1981), Mikva, J. dissenting.

7. 5 C.F.R. 1201.56(c)(3) defines harmful error as:

> Error by the agency in the application of its procedures which, in the absence or cure of the error, might have caused the agency to reach a conclusion different than the one reached. The burden is upon the appellant to show that based upon the record as a whole the error was harmful, i.e., caused substantial harm or prejudice to his/her rights.

8. Chair King qualifies as an official with authority to make a final decision under 5 C.F.R. Section 752.404(c)(2), since she did in fact make the decision.

9. 5 U.S.C. Section 3303 is titled Competitive Service; recommendations of Senators and Representatives, and prohibits consideration of such recommendations.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision were sent by certified mail this date to the following:

Lacy B. Ward
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Philadelphia, PA 19139

Renea A. Webb
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Alan C. Shakin
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Director, Division of Personnel Management
Consumer Product Safety Commission
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Office of Policy Analysis
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Attn: Ms. Jeanette Neville
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Washington, DC 20415

By regular mail to:

(with copy of initial decision)

Office of the Secretary
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, DC 20419

Jacqueline R. Bradley
Assistant Managing Director for Regional Operations
Merit Systems Protection Board

A-158

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13 APR 1982 _____
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